No. 91-1188-CFX
Status: GRANTED

Title: James Rowland, Former Director, California Department of Corrections, et al., Petitioners
v.
California Men's Colony, Unit II Men's Adv. Council

Docketed:
January 13, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Ching,James

Counsel for respondent: Weisselberg,Charles D., Locklin,James H.

NOTE: 012192 ck rec'd

Entry	Date	Note	Proceedings and Orders
1	Jan 13 1992	G	Petition for writ of certiorari filed.
2	Feb 5 1992		Appendix of petitioner filed.
3	Feb 7 1992		Brief of respondent California Men's Colony in opposition filed.
4	Feb 12 1992		DISTRIBUTED. February 28, 1992
5	Feb 14 1992	X	Reply brief of petitioners James Rowland, et al. filed.
6	Mar 2 1992		Petition GRANTED.
			**********
7	Mar 9 1992	G	Motion of petitioner to dispense with printing the joint appendix filed.
8	Mar 23 1992		Motion of petitioner to dispense with printing the joint appendix GRANTED.
9	Apr 10 1992		Brief of petitioners James Rowland, et al. filed.
10	Apr 14 1992	N	Motion of respondent for leave to proceed further herein in forma pauperis filed.
12	Apr 17 1992		Copy of USCA-9th Circuit order received and distributed.
11	Apr 27 1992		Motion of respondent for leave to proceed further herein in forma pauperis. deferred to the hearing of the case on the merits. The Clerk is directed to print respondent's brief on the merits.
13	May 28 1992		Brief of respondent California Men's Colony, Unit II filed.
14	Jun 10 1992		Reply brief of petitioner filed.
15	Jun 23 1992		Record filed.
		*	Partial proceedings and briefs U. S. Court of Appeals for the Ninth Circuit.
16	Jul 2 1992		Record filed.
		*	Original proceedings U. S. District Court, Central District of California.
17	Jul 10 1992		CIRCULATED.
18	Jul 21 1992		SET FOR ARGUMENT TUESDAY, OCTOBER 6, 1992. (3RD CASE).
19	Aug 7 1992	G	Motion of respondent to direct the Clerk to print respondent's supplemental brief filed.
20	Sep 4 1992	X	Supplemental brief of petitioners James Rowland, et al. filed.
21	Oct 5 1992		Motion of respondent to direct the Clerk to print respondent's supplemental brief GRANTED.
22	Oct 5 1992	X	Supplemental brief of respondent filed.
23	Oct 6 1992		ARGUED.

COPY

91-1188

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES ROWLAND, et al., Petitioner,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an organization, association, or corporation, and in particular an inmate association, may proceed in forma pauperis as a "person" within the meaning of 28 U.S.C. section 1915(a).[1/]

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1. This question was not expressly considered by the district court but was the sole issue addressed by the Ninth Circuit in its opinion. CMC Unit II Men's Adv. Council v. Rowland, 939 F.2d 854, 856, n.1 (9th Cir. 1991).

LIST OF PARTIES

When respondent filed its action, petitioner James Rowland was the director of the California Department of Corrections; petitioner James H. Gomez was the Chief Deputy Director of the Department of Corrections; petitioner Sara Bruce was the Chief of the Regulation and Policy Management Unit, Department of Corrections; and petitioner Leslie Bandaccari worked in the Institutions Services Unit, Department of Corrections.

Respondent Men's Advisory Council, California Men's Colony-West, is a voluntary association of inmates incarcerated in the California Men's Colony-West.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES ROWLAND, et al., Petitioner,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners James Rowland, et al., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 29, 1991.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported at 939 F.2d 854 (9th Cir. 1991) and is reprinted in the appendix submitted with this Petition.

JURISDICTION

The Ninth Circuit rendered its opinion and entered judgment on July 29, 1991. The Ninth Circuit, after consideration of petitioners' request for rehearing en banc, denied the request on December 5, 1991. This petition is filed within 90 days of that date.

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

The statute involved is subdivision (a) of 28 U.S.C. 1915, relating to proceedings in forma pauperis, which reads as follows:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

With regard to the term "person" in section 1915(a), the Ninth Circuit referred to the following portions of 1 U.S.C. section 1:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise-- . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

STATEMENT OF THE CASE

This case involves an inmate association which was denied leave to proceed in forma pauperis by the district court. In December 1989, the Men's Advisory Council lodged its complaint with the district court. In addition to the complaint, the Men's Advisory Council filed a motion for leave to proceed in forma pauperis and a declaration supporting that application. The declaration, signed by an association officer, alleged personal poverty on the part of the declarant.

On December 22, 1989, an order was filed by the district court denying this motion. The Men's Advisory Council requested that the court reconsider its motion, but that request was denied on March 27, 1990. The Men's Advisory Council filed a timely notice of appeal on April 18, 1990.

The Attorney General of the State of California represents petitioners by reason of a July 20, 1990 order of the Ninth Circuit requiring "the Attorney General of the State of California to enter an appearance on behalf of appellees, to file a brief on their behalf, and to appear at any oral argument." The Attorney General complied

with that order and has been regarded as counsel of record since the issuance of the order. However, petitioners, the named defendants in this case, have not been served and therefore they have not yet requested the Attorney General to represent them. The only facts which are in the record are those alleged by respondent in the complaint.

STATEMENT OF FACTS

The Men's Advisory Council of California Men's Colony, West Facility (CMC), Unit II was created by Warden's General Order Number 38. As described in the complaint, the association has the following purpose and objectives:

(A) To promote the welfare of the inmates through their duly elected representatives, to analyze and properly present to the Program Administrator ("P.A.") and the Warden/Chief Deputy Warden, recommendations which may, upon approval, lead to the common and mutual benefit of all inmates of CMC.

(B) To provide inmates of CMC with representation and a voice in administrative deliberations and decisions affecting the welfare and best interest of all inmates.

(C) To provide the Warden/Chief Deputy Warden and institution administrative staff with a means whereby administrative actions, and the reasons for these actions, may be communicated and understood by the general inmate population.

The members of the Men's Advisory Council are elected from the general prison population.

Since 1949, the Department of Corrections of the State of California had maintained a program, reflected in Director's Rules Section 3180, of providing free tobacco to inmates who are without funds to purchase it. On June 16, 1989 the Department issued a memorandum which discontinued this program.

Because there are incarcerated persons with an addiction to nicotine, discontinuing the distribution of free tobacco to these inmates forces them to support their addiction in other ways. Some inmates in California Men's Colony, West Facility, Unit II have been observed scavenging cigarette butts off sidewalks, ditches, gutters, and underneath dormitory steps. These practices, as well as the practice of lighting one cigarette and allowing many inmates to take turns smoking it, create a dangerous health risk by increasing the possibility of transmitting AIDS[2/] and other infectious diseases. In addition, indigent inmates may become indebted to other inmates

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2. This and other factual assertions are presently uncontested in the record, but it must be remembered that this matter went to the lower appellate court before any discovery was undertaken or any dispositive motions were made. Moreover, there has been no opportunity to challenge the constitutional standing of the association to assert its members' rights. *See* Warth v. Seldin, 422 U.S. 490, 510 (1975).

in exchange for cigarettes, thereby risking the health and safety of those individuals. The Men's Advisory Council submitted an administrative appeal to the Warden of California Men's Colony, West Facility, requesting that distribution of free tobacco to indigent inmates be resumed. The appeal was denied on August 25, 1989.

The Men's Advisory Council attempted to file a complaint for violation of civil rights with the United States District Court for the Central District of California, through the Council's chief officer, William Cochran. The complaint named as defendants: James Rowland, Director of the California Department of Corrections; James H. Gomez, Chief Deputy Director of the California Department of Corrections, Sara Bruce, Chief of the Regulations and Policy Management Unit of the California Department of Corrections; and Leslie Bandaccari, an employee of the California Department of Corrections. The Men's Advisory Council claims that its members' federal rights were violated when the defendants repealed section 3180 prior to submission and action by the Office of Administrative Law, as required by California Government Code Section 11349. Further, the Men's Advisory Council claims that the defendants violated the Council's members' Eighth Amendment rights by creating conditions which cause mental, physical, and emotional deterioration. The Men's Advisory Council sought only declaratory and injunctive relief.

With its complaint, the Men's Advisory Council filed a motion for leave to proceed in forma pauperis, together with an affidavit executed by the Council's Chairman,

William Cochran. The declaration was a statement of Cochran's poverty. Under Warden's Order No. 38, the Men's Advisory Council is not authorized to create an account or to collect funds. On December 15, 1989, a United States Magistrate recommended that the in forma pauperis application be denied due to an inadequate showing of poverty. On December 22, 1989, the district court followed that recommendation and ordered that the application be denied. William Cochran, Chairman of the Men's Advisory Council, then requested reconsideration of the court's denial of leave to proceed in forma pauperis. Judge Takasugi denied the request for reconsideration, but indicated that the court would consider an amended application which included details of each individual's indigency.

On April 18, 1990, the Men's Advisory Council, through Cochran, filed a notice of appeal with the United States District Court for the Central District of California. The Men's Advisory Council also submitted a motion and affidavit to appeal in forma pauperis, which was denied by the district court on April 19, 1990. On July 20, 1990, the court of appeals, on its own motion and under 28 U.S.C. section 1915(d), appointed present counsel to represent the Men's Advisory Council. The court also granted the motion for leave to appeal in forma pauperis.

ARGUMENT

ASSOCIATIONS ARE NOT ENTITLED TO IN FORMA PAUPERIS STATUS UNDER 28 U.S.C. SECTION 1915

The underlying circumstances of this case are undisputed in the record, as the sole pleading in the record is the complaint. Further, there is a small and discrete body of law and legislative history which all the parties, the circuit court, and other circuit courts which have considered the subject agree is relevant.

Nevertheless, there is no unanimity as to whether section 1915(a) permits associations[3] to proceed in forma

3. There may be some confusion as to terminology without a further definition of terms. The following definition of association is derived from Black's Law Dictionary (4th ed. 1951):

> The act of a number of persons in uniting together for some special purpose or business. The persons so joining. It is a word of vague meaning used to indicate a collection of persons who have joined together for a certain object . . . An unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise . . . . It is not a legal entity separate from the persons who compose it . . . .

pauperis.[4] The Ninth Circuit, having determined that there is a split among the circuits, has in candid fashion considered both sides and chosen the minority view, i.e. that associations may proceed in forma pauperis. CMC Unit II, Men's Advisory Council v. Rowland, 939 F.2d at 858 [hereinafter CMC]. Certiorari should be granted to resolve the manifest conflict among the circuits in the interpretation of the in forma pauperis statute. This Court should intervene to declare a uniform rule for the guidance of the district courts in light of the legislative history, the statutory context in which the instant litigation is raised, 42 U.S.C. section 1983, and this Court's own independent power to prescribe procedures for the efficient administration of the federal courts.[5]

4. Section 1915 appears to be a breeding ground for these peculiar and seemingly unavoidable procedural disputes. *See* Hernandez v. Denton, No. 90-1846 [section 1915(d)].

5. No constitutional issue is implicated here. The benefits of in forma pauperis are "entirely statutory." Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963); Brown v. Johnston, 99 F.2d 760 (9th Cir. 1938) and the Ninth Circuit opinion is devoid of any discussion of constitutional principles.

A. The legislative history of section 1915(a) provides no basis for permitting associations to proceed in forma pauperis.

This case turns on whether the word "person" in 28 U.S.C. section 1915(a) is interpreted to include "corporations, companies [and] associations" under 1 U.S.C. section 1. To decide that, it is necessary to establish the intent of Congress when it enacted that language. Few courts have addressed this question, and those few have disagreed, but the legislative history is not in dispute. *See* Note: Proceeding In Forma Pauperis in Federal Court: Can Corporations Be Poor "Persons"?, 62 Cal.L.Rev. 219 (1974).

Before 1959 only a "citizen" could benefit from section 1915 and it was settled law that a corporation was not a citizen for purposes of obtaining in forma pauperis status. Atlantic S.S. Corp. v. Kelley, 79 F.2d 339, 340 (5th Cir. 1935); Quittner v. Motion Picture Producers & Distributors of America, Inc., 70 F.2d 331, 332 (2nd Cir. 1934). In 1959, section 1915 was amended by substituting the word "person" for "citizen," and the legislative history is clear that the purpose of this change was only to permit resident aliens to sue in forma pauperis. However, section 1 provides that in "determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word 'person' . . . include[s] corporations, companies, associations . . . ." The question, then, is whether Congress, when it adopted the word "person," intended that word to extend the coverage of section 1915

to all entities listed in section 1 or merely to resident aliens.

The primary argument for the inclusion of associations, companies or corporations within section 1915(a) was made by Chief Judge Bazelon in his dissenting opinion in SOUP Inc. v. FTC, 449 F.2d 1142, 1143 (D.C. Cir. 1971). The Chief Judge argued that Congress should be deemed to have been aware of section 1, and that there was no indication in the legislative history of the 1959 amendment that Congress did not intend to cover corporations with "person."

Two district courts have followed Judge Bazelon's lead, both phrasing their arguments in double negatives. "Neither the language nor the legislative history of § 1915(a) indicates that a corporation composed of and serving primarily poor persons should not be allowed to proceed in forma pauperis the same as an indigent individual." River Valley, Inc. v. Dubuque County, 63 F.R.D. 123, 124 (N.D. Iowa 1974). "In this Court's view, neither the words of the statute nor its legislative history can be read to attribute to Congress an intent not to include corporations of whatever nature within the meaning of the word 'person' in this statute. [Emphasis in original.]" Harlem River Consumers Coop v. Associated Grocers, 71 F.R.D. 93, 95 (S.D. N.Y. 1976).

The courts of appeals of two circuits and three district courts, including Judge Bazelon's own court, have rejected this reasoning. FDM Mfg. Co. v. Scottsdale Insurance Company, 855 F.2d 213, 214-215 (5th Cir.

1988); SOUP Inc. v. FTC, 449 F.2d at 1142-1143 (D.C. Cir. 1971); Sears Roebuck & Co. v. C.W. Sears Real Estate, 686 F.Supp. 385, 386-388 (N.D. N.Y. 1988), *aff'd. on other grounds*, 865 F.2d 22, 23 (2d Cir. 1988); MOVE Organization v. U.S. Dept. of Justice, 555 F.Supp. 684, 690-692 (E.D. Penn. 1983); Honolulu Lumber Co. v. American Factors Ltd., 265 F.Supp. 578, 580-581 (D. Hawaii 1966), *aff'd. on other grounds*, 403 F.2d 49 (9th Cir. 1968). Petitioners note that aside from Honolulu Lumber, all of these cases considered and specifically rejected the Bazelon argument.

The legislative history detailed in the majority cases provided "compelling evidence" of Congressional intent. *See generally* 1959 U.S. Code Cong. & Admin. News 657, 2663. These courts found that the sole reason for the 1959 amendment was to allow resident aliens to proceed in forma pauperis and that there was no indication whatsoever that Congress intended to extend section 1915 to associations and corporations. Thus, while there may be perfectly sensible policy grounds for allowing impoverished corporations to proceed under section 1915, that decision should be reserved for Congress. FDM Mfg. Company, 855 F.2d at p. 214; Sears Roebuck & Company, 686 F.Supp. at 388. In sum, it appears that the opinion of the Ninth Circuit in this case is without a majority opinion precedent from any circuit court and therefore represents an anomalous rule which seriously modifies the scope of our in forma pauperis statute.

B. Section 1, by its own terms, does not automatically govern the definition of "person" in section 1915(a).

Moreover, there is no reason to automatically import the section 1 definition of "person" because the section 1 definition comes into play "unless the [statutory] context indicates otherwise". 1 U.S.C. section 1. If the context of the statute in question indicates a different meaning for "person", the statute-specific interpretation should be used. By its own terms, section 1 has no universal pretentions.

Given that section 1983 itself contains a "person-citizen" dichotomy[6/], it must be asked whether section 1983 is a context which could require a definition of

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6. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia [Emphasis added].

"person" tailored to the statutory purpose of section 1983. This is no matter of hair-splitting. Section 1 purports to define "person" generally. Section 1983's definition is based on the Fourteenth Amendment and the constitutional definition has precedence in resolving the legal issues raised by this appeal. The Fourteenth Amendment and section 1983 contain a definition of "person" which is constitutionally mandated. The utilization of "person" as a term of art in the in forma pauperis statute and section 1983, coupled with the language of section 1, imply that section 1983's definition of those with standing to plead the section 1983 action is also determinative of those who may proceed in forma pauperis.

An example of the finding of a specialized definition of "person" within the specific terms and policies of a statute is contained in the Ninth Circuit's recent case, Crumpton v. Gates, ___F.2d___, No. 90-55117 (Nov. 4, 1991). In this case, the Ninth Circuit did not hesitate to extend the definition of "person" under section 1983 to include a fetus. The Ninth Circuit did not even consider applying section 1 to the problem. Instead, contrary to the logic espoused in other circuits, the Ninth Circuit found that the allegedly wrongful killing of the father did not occur until the fetus' birth, at which time the fetus had become a person under section 1983.

Unfortunately, there is no case on point as to whether an association is a "person" within the meaning of section 1983. In U.S. v. Martin, 866 F.2d 972 (8th Cir. 1989), the issue was whether a drug store was not a

"person" within the meaning of a statute forbidding the burglary of controlled substances from a person registered with the Drug Enforcement Administration. The court considered both section 1 and the legislative history of the criminal provision, 18 U.S.C. section 2118(b), and found that a drug store be a possible victim under section 2118(b). In Martin as in Crumpton, the specific features of the statute which underlay the action had to be considered in determining the meaning of "person" for the purposes of enforcing the statute.

In Hague v. Committee for Industrial Organization, 307 U.S. 496, 514 (1939), a civil rights suit challenging municipal actions in derogation of the rights of citizens under the Fourteenth Amendment, the Supreme Court held that corporations could not be plaintiffs. However, in California Diversified Promotions v. Musick, 505 F.2d 278, 283 (9th Cir. 1974), it was held that corporate plaintiffs had standing to sue in civil rights actions. The Supreme Court citations in support of this proposition antedated the Hague ruling. Clearly there is doubt as to when even a corporation has standing. A fortiori, there is ambiguity as to associations.

C. The instant decision creates immense practical problems of administration which remain unanswered.

The legal authority contrary to the Ninth Circuit's holding is significant. But there are practical effects of the opinion on the administration of justice in the district

courts which should also be considered. Implicit in the Ninth Circuit's discussion of which matters were not decided by its opinion is a sense of the dimensions of the changes wrought in the in forma pauperis statute. The court did not "delineate the procedure by which . . . courts are to make that indigency requirement," given "the complexities that might arise in determining whether corporations or associations are indigent." The court eschewed "a comprehensive test for determining indigency" and did not decide "the relevance of members' individual finances in determining an association's indigency." CMC at 859, n.5. In short, the court admitted that an entirely new test of indigency must be developed for the associations it freed to pursue litigation in their own names and it declined to state the terms of the new test.

For the courts denying section 1915 to organizations, determination of poverty was a major concern. The court in each case, except FDM Mfg. Company, either pierced the corporate veil or said it would have to do so if organizations were covered by section 1915. The problem is most clearly stated in Sears Roebuck & Company, supra 686 F.Supp. at 388:

> In addition to this legislative history, another consideration weighs against permitting corporations to reap the benefits of section 1915. If corporations were allowed to proceed in forma pauperis, there would exist the prospect that stockholders of a closely-held corporation might try to hide behind a corporate veil in order to avoid the costs of

litigation. This danger was touched upon in MOVE Organization, 555 F.Supp. at 691, and Honolulu Lumber, 265 F.Supp. at 581. That such a scenario would arise is so obvious that it is doubtful that Congress would not have provided some guidance to the courts concerning how deeply they should look behind the corporate structure to determine indigency if it truly intended corporations to reap the benefits of the statute.

A fortiori, if the corporation presents a substantial problem as an in forma pauperis plaintiff, a less formal organizational structure such as a voluntary unincorporated association

> presents a greater danger. Such an association does not necessarily meet the formal state standards for incorporation and the absence of compliance with such standards amplifies the danger pointed out in the Sears Roebuck case. The absence of such formalities implies an amorphousness inconsistent with efficient judicial administration.

For example, a corporation board may vote to proceed with litigation and there is no dispute that the vote represents the shareholders. Moreover, it may be determined that the board vote is the appropriate mode for authorization of the action by reference to the corporation charter. The formal corporate structure embodied in the corporation charter, read within the context of the state corporation laws, leaves no doubt as to

the legitimacy of the corporation's initiation of the legal action.

Nice questions of standing and case and controversy appear when an informal association purports to initiate legal action. In the instant case, have the members of the association approved the action and have all the members spoken in a manner which comports with some measure of due process? Assuming arguendo they have, do these members have an interest in free tobacco which merits their participation in the action? The Men's Advisory Council, is not itself affected by the facts alleged in its complaint. It is suing merely as a representative of what may be only a small portion of its members, given that some prison inmates do not smoke. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991). Underlying any application of an association under section 1915 are complex questions about the interrelation between members and the association which are absent in the case of a corporation. Such vexing problems should not be created and left unsolved to harry our already overburdened trial courts.

Other unanswered questions are legion. For example, it appears there is a fundamental distinction between the "corporation" cases and the prisoner association before this Court. A corporation has a legal identity, corporate officers, agents for service by process, articles of incorporation, and a defined membership.[7] An inmate

7. A corporation cannot appear pro se and must litigate through an attorney, and this rule is "venerable and widespread". Jones v. Niagra Frontier Trans. Auth., 722 F.2d 20, 22 (2d Cir. 1983). Both the Ninth Circuit and the California state courts honor this rule (Taylor v. Knapp, 871 F.2d 803, 806 (9th Cir. 1989); Rogers v. Municipal Court, 197 Cal.App.3d 1314, 1318, 243 Cal.Rptr. 530 (1988)), and there is no case contrary to the rule. *See* Southwest Express Co. v. ICC, 670 F.2d 53, 55 (5th Cir. 1982); Strong Delivery Ministry Assn. v. Bd. of Appeals, 543 F.2d 32, 34 (7th Cir. 1976); Hawkeye Bank and Trust v. Baugh, 463 N.W.2d 22, 25-26 (Iowa 1990); Walacavage v. Excell 2000, 480 A.2d 281, 284 (Pa. 1984); Oahu Plumbing v. Kona Construction, 590 P.2d 570, 572-573 (Haw. 1979).

The rationale for the rule is simple. As stated in Jones at 22, a corporation appearing pro se without attorney representation may lack the necessary professional skills and ethics. The conduct of litigation by a non-lawyer "creates unusual burdens not only for the party he represents but as well for his adversaries and the court." It is unclear how an association, an organizational form more amorphous than a corporation, may better maintain a pro se suit, let alone in forma pauperis, consistent with the logic barring corporations from proceeding in pro se.

association does not have most of these attributes. Those proceeding in forma pauperis through the association do not have to possess individual standing or proceed as a class. Indeed, the opinion sub rosa undermines the carefully constructed procedure for certifying class actions. F.R.C.P. Rules 23, 23.2.

The possibilities for evasion of standing and indigency requirements are evident. An "indigent"

association, one which was forbidden to have assets, could be created solely for the purpose of acting as a litigant for non-indigent parties. Discovery will be needlessly encumbered by the necessity to search for individuals with standing and with true cases and controversies. Our federal courts should not be confronted with a myriad of loose confederations which are in forma pauperis litigation agencies in perpetuity for whatever individual grievances some number of its members might have. CMC not only is contrary to established law but also creates an opportunity for serious abuse of the in forma pauperis statute that could ultimately undermine its effectiveness.

CONCLUSION

The legislative history of section 1915 offers no support to the inclusion of organizations within its coverage, and that such an inclusion would create serious and unresolved problems of verification of poverty, standing and case and controversy. The minority position adopted by this court will create myriad problems for the trial courts without any benefit to potential litigants. Therefore, this Court should grant the petition for certiorari and reverse the holding of the Ninth Circuit.

DATED: December 9, 1992

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
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APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA MEN'S COLONY, Unit II Men's Adv. Council,
Plaintiff-Appellant,

v.

JAMES ROWLAND, Director, JAMES H. GOMEZ, SARA BRUCE, LESLIE BANDACCARI,
Defendants-Appellees.

No. 90-55600
D.C. No. MISC-24405-R
OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
May 9, 1991—Pasadena, California

Filed July 29, 1991

Before: Thomas Tang, Stephen Reinhardt and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Statutes

Reversing and remanding a district court judgment, the court of appeals held that associations are "persons" within the meaning of 28 U.S.C. § 1915(a), entitled to proceed on forma pauperis upon a showing of indigency.

Appellant California Men's Colony, Unit II, Men's Advisory Council (MAC), an inmates' organization, challenged the district court denial of their motion to proceed under forma pauperis under 28 U.S.C. § 1915(a) in a civil rights action under section 1983. The district court also denied a motion for reconsideraiton of its ruling.

[1] This case turned on whether the word "person" as used in section 1915(a) includes associations such as MAC. [2] The court agreed that the plain meaning of that section, when read in conjunction with 1 U.S.C. § 1, indicates that associations can proceed in forma pauperis if they meet the indigency requirements. [3] However, the court noted that the appellee was far from alone in reaching the conclusion that the legislative history reveals a congressional intent to deny the benefits of § 1915 to all but natural persons. A majority of courts have also concluded that federal courts are not authorized to permit associations or corporations to proceed in forma pauperis. [4] But the court found nothing in this legislative history to justify a construction of that section so flatly contrary to the statute's plain meaning. [5] The most that could be said about that history is that it indicates that Congress did not explicitly consider whether an amendment to that section would extend the statute's reach beyond citizens and aliens. Such congressional silence, however, does not constitute the type of compelling contrary evidence the court must find before abandoning a statute's plain meaning.

[6] Under the facts of this case, it was unnecessary to remand the case for the purpose of having the district court determine indigency. It was undisputed that the MAC is prohibited by prison regulation from maintaining any assets, including a bank account. Thus, not only was MAC indigent, but that state of affairs was clearly not due to any effort on the part of its members to obtain the benefits of litigation without bearing the ordinary financial burdens. On remand, then, the district court was ordered to grant the motion to proceed in forma pauperis.

COUNSEL

Charles D. Weisselberg, James H. Locklin, University of Southern California Law Center, Los Angeles, California, for the plaintiff-appellant.

Richard Thomson, Supervising Deputy Attorney General, Sacramento, California, for the defendants-appellees.

OPINION

WIGGINS, Circuit Judge:

The California Men's Colony, Unit II, Men's Advisory Council ("the MAC") appeals the district court's denial of its motion pursuant to 28 U.S.C. § 1915(a) to proceed in forma pauperis in this civil rights action brought under 42 U.S.C. § 1983. The district court denied the motion on the ground that the appellant had not made an adequate showing of indigency as required by § 1915. The court also denied the MAC's request for reconsideration of that ruling. By order of July 20, 1990, we granted the MAC's motion to proceed in forma pauperis for the purpose of addressing an issue of first impression in this Circuit: whether an organization may proceed in forma pauperis pursuant to 28 U.S.C. § 1915. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(3), and we have jurisdiction to review the denial of the MAC's motion under 28 U.S.C. § 1291. Because we find that the plain meaning of the statute indicates that associations may be authorized to proceed in forma pauperis, we reverse the district court's ruling.

BACKGROUND

The MAC, which was created by the warden of California Men's Colony, is an association of inmates, elected by the

general prison population, that acts both as an advocate for inmate interests and as a sort of prison administration/inmate liaison. It brought this action alleging violations of the eighth and fourteenth amendments of the United States Constitution based on the Department of Correction's June 1989 directive to all state prison wardens instructing them to discontinue the program, established in 1949, of providing free tobacco to inmates who are unable to afford it. The complaint seeks declaratory and injunctive relief to have the program reinstated.

At the time it filed the complaint, the MAC also filed a motion for leave to proceed in forma pauperis. Accompanying the motion was an affidavit signed by William Cochran, the Council's Chairman, indicating that the MAC is prohibited by prison regulations from holding any assets whatsoever. The district court adopted the magistrate's recommendation that the motion to proceed in forma pauperis be denied on the ground that the MAC had made an inadequate showing of indigency. In denying the MAC's request for reconsideration of that ruling, the court stated that "[i]f the requesting party wishes to amend its application to proceed in forma pauperis with details of each individual's indigency, the court will consider the amended application." The MAC chose to file this appeal rather than to reapply.

By order of July 20, 1990, this Court granted the appellant's motion to proceed in forma pauperis for the purpose of addressing on appeal the question whether an organization may proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a).[1] We also appointed counsel to represent the appellants, and

[1]We note that our order instructed the parties to address a question upon which the district court did not expressly rule. That is, because the district court denied the appellant's motion to proceed in forma pauperis on the ground that it had not made an adequate showing of indigency, it did not decide the threshold question — which this Court instructed the parties to address in this appeal — of whether the statute authorizes an organization to proceed in forma pauperis.

directed the California Attorney General to represent the appellees.

DISCUSSION

The parties agree that the issues raised by this appeal are purely legal questions that we review de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

I.

"When construing a statute, we look first to the plain meaning of the language in question." *S & M Inv. v. Tahoe Regional Planning Agency*, 911 F.2d 324, 326 (9th Cir. 1990) (citation omitted), *cert. denied*, 111 S. Ct. 963 (1991). This "plain meaning rule" is based on the view "that in the vast majority of its legislation Congress does mean what it says and thus the statutory language is normally the best evidence of congressional intent." *Church of Scientology v. United States Dept. of Justice*, 612 F.2d 417, 421 (9th Cir. 1979). When the plain language appears to settle the question, we "'look to the legislative history to determine only whether there is clearly expressed legislative intention contrary to that language.'" *S & M Inv.*, 911 F.2d at 327 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)) (internal quotation omitted).

[1] We must apply these principles of statutory construction to the federal in forma pauperis statute, codified at 28 U.S.C § 1915, which provides in relevant part:

> **§ 1915. Proceeding in forma pauperis**
>
> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or

> security therefor, by a *person* who makes affidavit that he is unable to pay such costs or give security therefor.

28 U.S.C. § 1915(a) (emphasis added). This case turns on whether the word "person" as used in § 1915(a) includes associations such as the MAC. The appellant argues that the question is conclusively resolved by reference to 1 U.S.C. § 1, which provides in part:

> **§ 1. Words denoting number, gender, and so forth**
>
> In determining the meaning of any Act of Congress, unless the context indicates otherwise — ... the word[ ] 'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals ....

1 U.S.C. § 1. The MAC contends that this statutory scheme unambiguously establishes that associations such as itself qualify as a "person" for purposes of § 1915(a), and that a federal court is therefore authorized to permit such an association to proceed in forma pauperis.

[2] This position was first set forth in a dissenting opinion by Chief Judge Bazelon of the District of Columbia Court of Appeals in *S.O.U.P., Inc. v. F.T.C.*, 449 F.2d 1142, 1143-45 (D.C. Cir. 1971) (per curiam) (Bazelon dissenting).[2] The majority in *S.O.U.P.* assumed without deciding that corporations could proceed in forma pauperis, but denied the motion on the grounds that the particular corporation involved had not submitted sufficient evidence of its indigency. *Id.* at 1142.

[2]Two district court have subsequently followed Judge Bazelon's lead. *See Harlem River Cons. Co-op. v. Assoc. Grocers, Etc.*, 71 F.R.D. 93 (S.D.N.Y. 1976); *River Valley, Inc. v. Dubuque County*, 63 F.R.D. 123 (N.D. Iowa 1974).

Chief Judge Bazelon, believing "that the statute does apply to corporations and that the petitioner has satisfied all reasonable standards which might be applied to test such applications," *id.* at 1143 (Bazelon dissenting), wrote a persuasive dissent. We quote in full his concise and compelling discussion of the language of § 1915(a):

> Section 1915(a) provides that a federal court may authorize litigation without prepayment of costs "by a *person* who makes affidavit that he is unable to pay such costs or give security therefor." [Emphasis added.] The statute's reference to "person" does not indicate, however, that the section has no application to corporations. On the contrary, the statutory guidelines for the interpretation of Congressional acts, 1 U.S.C. § 1 (1970), make clear that the term "person" should ordinarily be taken to "include corporations ... as well as individuals." Moreover, there is no indication in the legislative history of § 1915 that Congress intended to depart from this well-established canon of statutory construction.

Id. (footnote omitted). We agree that the plain meaning of § 1915(a), when read in conjunction with 1 U.S.C. § 1, indicates that associations can proceed in forma pauperis if they meet the indigency requirements.[3]

To overcome the normal presumption in favor of a statute's plain meaning, the appellee argues that the legislative history reveals "no indication whatsoever that Congress intended to extend § 1915 to corporations." This peculiar argument —

[3]We attribute no significance to the fact that *S.O.U.P.* involved a corporation, whereas this case involves an association or an organization. While such distinctions may affect a reviewing court's inquiry into a moving party's indigency status, they do not affect the threshold question we decide here, which is whether non-natural persons, however classified, may proceed in forma pauperis under § 1915(a).

peculiar because, as we have just seen, the statutory language itself expressly indicates such an intent — is based on the statute's legislative history, or, more specifically, on its amendment in 1959.

From the time the in forma pauperis statute was first enacted in 1892 until 1959, it authorized federal courts to permit a "citizen" to proceed without paying fees and costs. In 1959, however, Congress, in response to a suggestion by the Department of Justice, amended the statute by substituting the word "person" for "citizen." The only piece of legislative history accompanying the amendment is a Senate Report describing its purpose as follows:

> The legislative proposal recommended by the Department of Justice would substitute the word "person" for the word "citizen." *Thus, indigent aliens would be extended the same privilege of proceedings in forma pauperis as is now afforded citizens.* It is the opinion of the Department of Justice that this proposal would be consonant with the ideas or policies of the United States.
>
> In addition, the Judicial Conference of the United States in recommending this legislation pointed out that the distinction between citizens and aliens as contained in existing law may be unconstitutional. Furthermore, it may also be in violation of various treaties entered into by the United States with foreign countries which guarantee to their citizens access of the courts of the United States on the same terms as American citizens.

S. Rep. No. 947, 86th Cong., 1st Sess. 2-4 (1959), *reprinted in* 1959 U.S. Code Cong. & Admin. News 2663, 2664 (emphasis added). The Report does not discuss the statute's applicability to associations, and it does not mention 1 U.S.C. § 1. Relying upon this legislative history, the appellees argue that

the amendment's sole purpose was to extend the coverage of § 1915(a) to both citizens and aliens, and hence that Congress never intended it to apply to associations such as the MAC.

[3] The appellee is far from alone in reaching the conclusion that this legislative history reveals a congressional intent to deny the benefits of § 1915 to all but natural persons (i.e. citizens and aliens). A majority of the courts that have addressed the question have also concluded, in reliance to a greater or lesser extent on this legislative history, that federal courts are not authorized to permit associations or corporations to proceed in forma pauperis.[4] Typical of the reasoning of these courts is the following passage from the only circuit court (the Fifth) that has confronted the issue squarely:

> This legislative history is compelling. We would be impermissibly reading more into the statute than Congress intended if we were to hold that the 1959 amendment added corporations as well as aliens to the list of those entitled to seek [in forma pauperis] status.

FDM Mfg., 855 F.2d at 214.

II.

[4] With all due respect to the courts that have reached a

[4] *FDM Mfg. Co., Inc. v. Scottsdale Ins. Co.*, 855 F.2d 213, 214-15 (5th Cir. 1988) ("legislative history is compelling"); *Honolulu Lumber Co., Ltd. v. Am. Factors, Ltd.*, 265 F.Supp. 578, 580-81 (D.Hawaii 1966) ("It thus appears that Congress never intended by this single word change in 1959 to extend this privilege to a whole new class of artificial persons."); *Sears Roebuck & Co. v. C.W. Sears Real Estate*, 686 F.Supp. 385, 386-88 (N.D.N.Y.) ("no evidence whatsoever that Congress intended to extend the statute's coverage to corporations"), *aff'd*, 865 F.2d 22 (2d Cir. 1988); *MOVE Organization v. U.S. Dept. of Justice*, 555 F.Supp. 684, 690-92 (E.D.Pa. 1983) (rule that § 1915(a) extends only to natural persons "is the better reading of the legislative history").

contrary conclusion, we find nothing in this legislative history to justify a construction of § 1915 so flatly contrary to the statute's plain meaning. As we noted above, by far the most compelling interpretation of § 1915(a)'s plain meaning is that, when read in conjunction with 1 U.S.C. § 1, "person" refers both to natural persons and to entities such as corporations and associations. We agree with an earlier district court that, in the course of addressing this issue, noted that "Congress may be assumed to have been aware of [1 U.S.C. § 1] at the time of the 1959 amendment to § 1915." *Harlem River*, 71 F.R.D. at 97. After all, that is presumably why Congress chose to codify the canons of statutory construction in 1 U.S.C. § 1 — so that it would be unnecessary to repeat these common principles of interpretation each time it enacts or amends a statute. According to the plain meaning of the statute, then, associations are "persons" that may be authorized to proceed in forma pauperis.

[5] That brings us to the legislative history. We may disregard the plain meaning of a statute only where there is a "clearly expressed legislative intention" contrary to that plain meaning. *Cardoza-Fonseca*, 480 U.S. at 432 n.12. We think that the most that can be said about that history is that it indicates that Congress did not explicitly consider whether the amendment to § 1915(a) would extend the statute's reach beyond citizens and aliens. Such congressional silence does not constitute the type of compelling contrary evidence we must find before abandoning a statute's plain meaning. Accordingly, we hold that § 1915 applies to associations.

III.

We turn to the facts of this case. In general, given the procedural status of this case, we would be hesitant to decide whether the appellant should be permitted to proceed in forma pauperis. Section 1915 typically requires the reviewing court to exercise its sound discretion in determining whether the affiant has satisfied the statute's requirement of indigency.

See, for example, United States v. McQuade, 647 F.2d 938, 940 (9th Cir. 1981) ("When a claim of poverty is made under section 1915 'it is proper and indeed essential for the supporting affidavits to state the facts as to affiant's poverty with some particularity, definiteness and certainty.'" (quoting *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). Because the appellant chose to appeal the district court's denial of its motion rather than to supplement its initial affidavit, we would normally be inclined to remand to the district court for a conclusive determination as to the appellant's indigency status.

[6] However, it is unnecessary to remand this case for that purpose. It is undisputed that the MAC is prohibited by prison regulation from maintaining any assets, including a bank account. Thus, not only is the appellant indigent, but that state of affairs is clearly not due to any effort on the part of its members to obtain the benefits of litigation without bearing the ordinary financial burdens. Accordingly, we find that the MAC has conclusively established that it meets the statute's indigency requirements. On remand, then, the district court shall grant the appellant's motion to proceed in forma pauperis.

We wish to clarify what we do not decide today. Having determined that non-natural persons such as corporations and associations may proceed in forma pauperis if they meet the indigency requirements, the facts of this case do not permit us to delineate the procedure by which reviewing courts are to make that indigency determination. Other courts that have decided this issue have discussed the unique considerations that confront a court in making this determination; we are not unwary of the complexities that might arise in determining whether corporations or associations are indigent, but those issues are not properly before us. And in any case, we do not think it would be wise to attempt a comprehensive test for determining indigency. The nature of that inquiry will vary depending upon the particular characteristics of both the affi-

ant and the case, and we are loath to fetter the discretion of future courts called upon to determine whether a party can satisfy the statutory requirements.[5]

CONCLUSION

We hold that associations are "persons" within the meaning of 28 U.S.C. § 1915(a), and hence that they may proceed in forma pauperis. If we have misread the true intention of Congress, it may of course alter the statute so as to preclude associations from qualifying for in forma pauperis status. Further, we find that the appellant has established its indigency such that it should be permitted to proceed in forma pauperis in this case. The district court's order is REVERSED and this matter is REMANDED for further proceedings.

[5]In particular, although we reject the approach suggested by the district court of reviewing the finances of MAC members to determine whether the association is indigent, we do so only on the ground that members are prohibited by prison regulation from contributing funds to the MAC. We do not decide, as a general matter, the relevance of members' individual finances in determining an association's indigency.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On January 9, 1992, I served the attached **Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

CHARLES D. WEISSELBERG
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West Los Angeles, CA 90064

Cynthia Bain
AFFIANT

Subscribed and sworn to before
me this 9th day of January, 1992.

Lucinda Seaton
Notary Public in and for said
County and State

LUCINDA SEATON
NOTARY PUBLIC - CALIFORNIA
County of Sacramento
My Commission Expires 2/2/93

Supreme Court, U.S.
FILED
FEB 5 1992
OFFICE OF THE CLERK

No. 91-1188

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES ROWLAND, et al., Petitioner,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

SUPPLEMENTAL APPENDIX

DANIEL E. LUNGREN, Attorney General
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KENNETH C. YOUNG, Assistant Attorney General
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SUPPLEMENTAL APPENDIX

B-1 Order Re Leave to File Action Without Prepayment of Fees, filed December 22, 1989, United States District Court, Central District.

B-2 Order Denying Request For Reconsideration of Denial to Proceed in Forma Pauperis, filed March 27, 1990, United States District Court, Central District.

B-3 Order, filed December 5, 1991, United States District Court, Central District.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Men's Advisory Council PLAINTIFF, v. James Rowland DEFENDANT.	[Filed Dec. 22, 1989] CASE NUMBER Misc 24405 ORDER RE LEAVE TO FILE ACTION WITHOUT PREPAYMENT OF FEES

IT IS ORDERED that the complaint may be filed without prepayment of the filing fees.

NOTE: This order does not authorize a plaintiff or petitioner to proceed in forma pauperis or constitute an order that a hearing will be held. Further proceedings in this matter are subject to the orders of the Judge to whom the case is assigned. The Judge may strike the complaint or may dismiss the action for failure to comply with the Federal Rules of Civil Procedure or the Local Rules of the District Court.

☐ **Compliance with the Local Rules is hereby WAIVED for the filing of the complaint only.**

DATED: _____ _____
UNITED STATES MAGISTRATE

IT IS HEREBY RECOMMENDED that the application of plaintiff or petitioner to file the action without prepayment of the filing fee be DENIED for the following reason(s):

__X__ Inadequate showing of indigency
____ Patently frivolous
____ No federal jurisdiction
____ Other

DATED: 12/15/89 (signature eligible)
UNITED STATES MAGISTRATE

IT IS ORDERED that the application of plaintiff or petitioner to file the action without prepayment of the filing fee is ☐ GRANTED ☒ DENIED (See note above).

DATED: 12/20/89 (signed by Robert M. Takasugi)
UNITED STATES DISTRICT
COURT JUDGE

ORDER RE LEAVE TO FILE ACTION WITHOUT PREPAYMENT OF FEES
CV-73 (06/88)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEN'S ADVISORY COUNCIL, Plaintiff, vs. JAMES ROWLAND, Defendant.	[Filed Mar. 27, 1990] Misc. No. 24405 ORDER DENYING REQUEST FOR RECONSIDERATION OF DENIAL TO PROCEED IN FORMA PAUPERIS

This matter having come before the court, and this court having considered the pleadings and other documents filed herein and argument of counsel,

IT IS ORDERED that the request for reconsideration of denial to proceed in forma pauperis is denied. If the requesting party wishes to amend its application to proceed in forma pauperis with details of each individual's indigency, the court will consider the amended application.

Dated: MAR 27, 1990

/ s /
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Dec. 5, 1991]

CALIFORNIA MEN'S COLONY, Unit II Men's Adv. Council, Plaintiff-Appellant, v. JAMES ROWLAND, Director, JAMES H. GOMEZ, SARA BRUCE, LESLIE BANDACCARI, Defendants-Appellees.	No. 90-55600 D.C. No. MISC-24405-R ORDER

Before: TANG, REINHARDT, and WIGGINS,
Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On February 3, 1992, I served the attached **Supplemental Appendix** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

CHARLES D. WEISSELBERG
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Cynthia Bain
AFFIANT

Subscribed and sworn to before
me this 3rd day of February, 1992.

Notary Public in and for said
County and State

LUCINDA SEATON
NOTARY PUBLIC - CALIFORNIA
County of Sacramento
My Commission Expires 2/3/95

Supreme Court, U.S.
FILED
FEB 7 1992
OFFICE OF THE CLERK

No. 91-1188

In The

Supreme Court of the United States

October Term, 1991

JAMES ROWLAND, ET AL.,

Petitioner,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADVISORY COUNCIL,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court review a finding that an organization may sue *in forma pauperis* under an amended version of 28 U.S.C. section 1915(a), where this issue of statutory interpretation has reached the courts of appeals only twice in the thirty-two-years since the statute was amended?

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STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case and Statement of Facts.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Question Presented For Review Arises So Infrequently That It Does Not Present A Special Or Important Issue For Review.

The statute that governs *in forma pauperis* proceedings is 28 U.S.C. section 1915. In 1959, section 1915(a) was amended to provide that a "person" may proceed *in forma pauperis*. The issue in the present case is whether associations are "persons" within the meaning of section 1915(a). The court of appeals ruled that associations are "persons" because 1 U.S.C. section 1 defines the word "person" to include associations.

In the more than thirty years since section 1915(a) was amended to allow a "person" to proceed *in forma pauperis*, only two federal courts of appeals have squarely considered whether a non-natural entity can be a "person" under that statute. *See California Men's Colony, Unit II, Men's Advisory Council v. Rowland*, 939 F.2d 854 (9th Cir. 1991)[hereinafter *Men's Advisory Council*]; *FDM Manufacturing Co., Inc. v. Scottsdale Insurance Co.*, 855 F.2d 213 (5th. Cir 1988) (per curiam).[1] Furthermore, since 1959,

[1] Petitioner implies that the Court of Appeals for the District of Columbia Circuit has also ruled on this question. While Chief Judge Bazelon argued in dissent in *S.O.U.P., Inc. v.*

(Continued on following page)

only five district courts have considered this issue.[2] This Court's rules provide that "review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are *special* and *important* reasons therefor." Supreme Court Rule 10.1 (emphasis added). The infrequency with which this issue arises suggests that the issue is neither special nor important. This Court should not review this case.

Moreover, contrary to Petitioner's claims, courts are fully capable of determining on a case-by-case basis when an association is legitimately indigent. The court of appeals determined that, based on the peculiar facts of this case, the Men's Advisory Council was indigent; the court properly declined to set forth some general rule.[3]

(Continued from previous page)

FTC, 449 F.2d 1142, 1143 (D.C. Cir. 1971), that section 1915 should be read to include corporations, the majority of the court did not consider the question. In fact, the court assumed *arguendo* that a corporation could sue *in forma pauperis* under section 1915(a). *Id.* at 1142.

[2] *See Honolulu Lumber Co. v. American Factors, Ltd.*, 265 F.Supp. 578 (D. Hawaii 1966); *River Valley, Inc. v. Dubuque County*, 63 F.R.D. 123 (N.D.Iowa 1974); *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 71 F.R.D. 93 (S.D.N.Y. 1976); *Move Organization v. United States Department of Justice*, 555 F.Supp. 684 (E.D. Pa. 1983); *Sears, Roebuck and Co. v. Charles W. Sears Real Estate, Inc.*, 686 F.Supp. 385 (N.D.N.Y. 1988).

[3] The facts of this case are truly unique. The Men's Advisory Council was created by an order of the Warden and is prohibited by that order from collecting funds or engaging in any revenue generating activities. Thus, the court of appeals

(Continued on following page)

Similarly, other courts that have considered this issue have easily distinguished between those organizations that are genuinely indigent and those that have been created as some sort of subterfuge to avoid the costs of litigation. In *S.O.U.P.*, the majority concluded that "assuming arguendo that a corporation may proceed in forma pauperis, we think that it would be inconsistent with the congressional intent to hold that this corporation should be allowed to proceed in that manner in view of the financial data submitted. . . . " 449 F.2d at 1142. Likewise, the few district courts that have applied section 1915(a) to corporations have not had any difficulty determining whether the corporation was indigent. *See River Valley*, 63 F.R.D. at 125 ("[c]onsidering the nature of plaintiff's operation and the persons served thereby, and in view of the fact that defendants have effectively cut off all previous sources of funds for plaintiff and directed that plaintiff spend no more money, it appears to the court that the plaintiff is truly in good faith without funds to maintain this action"); *Harlem River*, 71 F.R.D. at 96 (*in forma pauperis* status granted where the plaintiff was a non-profit, public-interest corporation that was not formed to avoid litigation costs and whose individual members would not benefit financially from the action).[4]

(Continued from previous page)

found that the Council "conclusively established that it meets the statute's indigency requirements." *Men's Advisory Council*, 939 F.2d at 859.

[4] Some district courts have determined that section 1915(a) does not cover associations. Even those courts, however, do

(Continued on following page)

Cases involving organizations seeking *in forma pauperis* status under section 1915(a) are uncommon. Even when such cases arise, there is no difficulty determining when an organization is indigent. Consequently, the question presented for review is neither special nor important. This Court should not grant the Petition for Writ of Certiorari.

2. This Court Should Also Refrain From Granting Review Until Additional Courts Of Appeals Address The Issue.

Although the Men's Advisory Council acknowledges that two circuits are in conflict, the Council believes that if the issue ever becomes important, "further consideration of the substantive and procedural ramifications of the problem by other courts will enable [the Court] to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).[5] *See also Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from the denial of certiorari) ("my colleagues

---

(Continued from previous page)

not indicate that they would be incapable of determining when an association is legitimately indigent. *See, e.g., Move Organization*, 555 F.Supp. at 692 ("[e]ven if plaintiff were a 'person,' the filed affidavits are insufficient to support forma pauperis status").

[5] Although Supreme Court Rule 10.1(a) indicates that a conflict between two circuits is a valid reason for granting a petition for writ of certiorari, the existence of such a conflict is not controlling and the rule does not fully measure the Court's discretion. Supreme Court Rule 10.1.

. . . believe that this Court should postpone consideration of the issue until more . . . federal circuits have experimented with substantive and procedural solutions to the problem").

The issue in this case need not be resolved at this time. "[E]xperience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the law making process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desireable result." Stevens, *Some Thoughts On Judicial Restraint*, 66 Judicature 177, 183 (1982). Along these same lines, Justice Brennan has recognized that "there is already in place . . . a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Brennan, *Some Thought on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983). The inconsistency between the Ninth and Fifth Circuits regarding the application of section 1915 to associations is such a "tolerable conflict." Hence, even if this Court somehow considers the issue in this case to be special and important, this Court should allow additional courts of appeals to consider the question before granting review.

3. The Court Of Appeals Followed Established Principles of Statutory Construction In Concluding That The Men's Advisory Council May Proceed *In Forma Pauperis* Under Section 1915(a).

The court of appeals properly ruled that the Men's Advisory Council could proceed *in forma pauperis*. The

court of appeals concluded that "the plain meaning of § 1915(a), when read in conjunction with 1 U.S.C. § 1, indicates that associations can proceed in forma pauperis if they meet the indigency requirements." *Men's Advisory Council*, 939 F.2d at 857 (footnote omitted). The court simply followed the plain language of the two statutes.

Section 1915(a) provides that "[a]ny court of the United States may authorize the commencement . . . of any suit . . . without prepayment of fees and costs . . . by a *person* who makes affidavit that he is unable to pay such costs. . . . " 28 U.S.C. § 1915(a) (emphasis added). Section 1 states that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise – . . . the word[ ] "person" . . . include[s] . . . associations . . . as well as individuals. . . . " 1 U.S.C. § 1.[6] When read together, the plain meaning of the statutes is clear. Section 1915(a) allows associations to proceed *in forma pauperis*.

Petitioner offers no credible challenge to the plain meaning.[7] Petitioner instead claims that the legislative history surrounding the addition of the word "person" to section 1915(a) in 1959 "provides no basis for permitting

---

[6] Section 1 was on the books in 1959 when Congress amended section 1915(a) to provide that a "person" could proceed *in forma pauperis*. Thus, "Congress may be assumed to have been aware of [1 U.S.C. § 1] at the time of the 1959 amendment to § 1915." *Men's Advisory Council*, 939 F.2d at 858 (quoting *Harlem River*, 71 F.R.D. at 97).

[7] Petitioner's attempt to interpret the word "person" in light of section 1983 is clearly improper. *See* Petition at 13-15. The language of 42 U.S.C. section 1983 is irrelevant to the interpretation of the word "person" in section 1915(a).

associations to proceed *in forma pauperis*." *See* Petition at 10. As the court of appeals determined, however, the legislative history is *silent* as to whether associations were to be covered by section 1915(a). *Men's Advisory Council*, 939 F.2d at 858. Canons of statutory construction say that where the meaning of a statute is plain, legislative history is irrelevant unless it contains clear evidence that Congress intended a different meaning. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). The court of appeals recognized this rule and concluded that "congressional silence does not constitute the type of compelling contrary evidence we must find before abandoning a statute's plain meaning." *Men's Advisory Council*, 939 F.2d at 858.[8]

The plain meaning of section 1915(a) allows associations to proceed *in forma pauperis*. The court of appeals properly declined the state's invitation to elevate an ambiguous legislative history over the plain language chosen by Congress.

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[8] The author of the Ninth Circuit opinion is Judge Charles E. Wiggins, who served as a member of Congress from 1967 to 1979. Presumably he is familiar with Congress' dependence on "dictionary statutes" (such as section 1) when drafting other laws.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 91-1188

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES ROWLAND, et al., Petitioner,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRELIMINARY STATEMENT

Respondent's Brief in Opposition to the Petition for Certiorari was filed on February 7, 1992. Petitioner submits this Reply Brief pursuant to Rule 15.6 of the Rules of this Court.

ARGUMENT

THE DECISION TO GRANT ASSOCIATIONS LEAVE TO PROCEED IN FORMA PAUPERIS STATUS UNDER 28 U.S.C. SECTION 1915, BEING A NEW AND NOVEL DECISION, HAS NOT YET REALIZED ITS FULL POTENTIAL FOR MISCHIEF AND THIS COURT SHOULD GRANT CERTIORARI TO PREVENT ITS INEVITABLE DELETERIOUS CONSEQUENCES

Respondent raises two related arguments not addressed in the petition. First, respondent contends that the decision below applies to so few cases that, assuming arguendo the decision is wrong, this Court should exercise its discretion not to hear the case. Opposition Brief at 1; Rules of the Supreme Court, Rule 10.1. The second argument is that despite the fact that there is a conflict between the circuits, the circuits should continue to rule on the issue without this Court's guidance because the considered opinions of the circuits as a whole will enable this Court to "deal with the issue more wisely at a later

date". Opposition Brief at 4; *McCray v. New York*, 461 U.S. 961, 962 (1983). The former argument is ingenuous and the latter is specious.

The first argument does not acknowledge the fact that before the opinion was issued, there was little authority for associations to proceed in forma pauperis, let alone informal prisoner associations. Therefore, there are few decisions on point as to corporations and none on prisoner associations. The Ninth Circuit has expanded the scope of section 1915(a) in a manner which will inevitably increase the number of in propria persona section 1983 cases. We need not rely on empirical verification of the proposition that if a decision increases the number of possible plaintiffs who may proceed in forma pauperis, those plaintiffs will file their cases because there is no economic incentive not to file. Moreover, the obvious advantages given to association plaintiffs by the Ninth Circuit in evading the requirements of class certification, avoiding vexatious litigant determinations, and complicating discovery insure that there will be no reticence on their part to proceed.

The second argument, that there is no immediate need for resolution of the conflict between the Ninth Circuit and the remainder of the circuits, is meritless. Any expansion of the number of possible defendants will exert a hydraulic pressure on our overburdened trial courts, at least in the single circuit which permits association suits in forma pauperis. The number of prisoner civil rights cases increased 1600 percent during the 20-year period ending in 1987, and the number of

these cases which were meritorious was very small, both proportionately and absolutely. *Hernandez v. Denton*, 861 F.2d 1421, 1431 (9th Cir. 1988) (Aldisert, J., dissenting); see also Van Vort, *Note: Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 Fordham L. Rev. 1165 (1987); Feldman, *Indigents in the Federal Courts*, 54 Fordham L. Rev. 413 (1985); Turner, *When Prisoners Sue*, 92 Harvard L. Rev. 610 (1979). Under these extreme caseloads, there is no reason to delay examining the merits of the opinion below. Moreover, the unresolved issues concerning indigency determination, standing, and case and controversy (see Petition at 13-20) greatly complicate the determination of these cases within the Ninth Circuit. It is not a "tolerable conflict" to radically increase the number of in forma pauperis cases in one circuit while no other circuit experiences this strain, given the relative simplicity of the legal issues involved.

CONCLUSION

The instant case presents a purely legal question upon uncontroverted facts. The legal question is not complex and all parties and the Ninth Circuit agree as to the relevant law. This Court must rule on this matter before the opinion creates a situation which threatens the quality of justice and hinders the administration of the trial courts within the Ninth Circuit. Petitioner respectfully suggests that a summary disposition of the matters raised in the Petition be issued in petitioner's favor.

DATED: FEB. 1 4 1992

Respectfully submitted,

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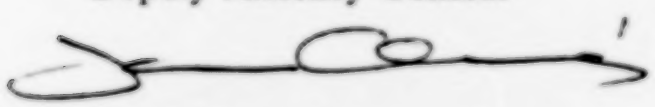

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CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On February 14, 1992, I served the attached **REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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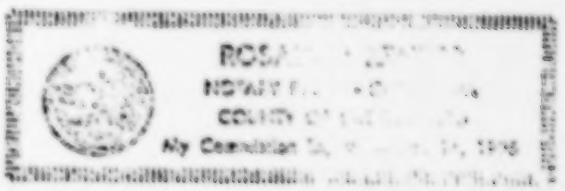
Subscribed and sworn to before
me this 14th day of February, 1992.

Rosalind Zuber
Notary Public in and for said
County and State



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No. 91-1188

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES ROWLAND, et al., Petitioners,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether an organization, association, or corporation, and in particular an inmate association, may proceed in forma pauperis as a "person" within the meaning of 28 U.S.C. section 1915(a).[1/]

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1. This question was not expressly considered by the district court but was the sole issue addressed by the Ninth Circuit in its opinion. CMC Unit II Men's Adv. Council v. Rowland, 939 F.2d 854, 856, n.1 (9th Cir. 1991), hereinafter "CMC".

LIST OF PARTIES

When respondent filed its action, petitioner James Rowland was the director of the California Department of Corrections; petitioner James H. Gomez was the Chief Deputy Director of the Department of Corrections; petitioner Sara Bruce was the Chief of the Regulation and Policy Management Unit, Department of Corrections; and petitioner Leslie Bandaccari worked in the Institutions Services Unit, Department of Corrections.

Respondent Men's Advisory Council, California Men's Colony-West, is a voluntary association of inmates incarcerated in the California Men's Colony-West.

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PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported at 939 F.2d 854 (9th Cir. 1991) and is reprinted in the appendix attached to the Petition for Certiorari.

JURISDICTION

The Ninth Circuit rendered its opinion and entered judgment on July 29, 1991. The Ninth Circuit, after consideration of petitioners' request for rehearing en banc, denied the request on December 5, 1991. The petition for certiorari was granted on March 2, 1992.

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

The statute involved is subdivision (a) of 28 U.S.C. 1915, relating to proceedings in forma pauperis, which reads as follows:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

With regard to the term "person" in section 1915(a), the Ninth Circuit referred to the following portions of 1 U.S.C. section 1:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise-- . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

STATEMENT OF THE CASE

This case involves an inmate association which was denied leave to proceed in forma pauperis by the district court. In December 1989, the Men's Advisory Council lodged its complaint with the district court. In addition to the complaint, the Men's Advisory Council filed a motion for leave to proceed in forma pauperis and a declaration supporting that application. The declaration, signed by an association officer, alleged personal poverty on the part of the declarant.

On December 22, 1989, an order was filed by the district court denying this motion. The Men's Advisory Council requested that the court reconsider its motion, but that request was denied on March 27, 1990. The Men's Advisory Council filed a timely notice of appeal on April 18, 1990.

The Attorney General of the State of California represents petitioners by reason of a July 20, 1990 order of the Ninth Circuit requiring "the Attorney General of the State of California to enter an appearance on behalf of appellees, to file a brief on their behalf, and to appear at any oral argument." The Attorney General complied with that order and has been regarded as counsel of record since the issuance of the order. However, petitioners, the named defendants in this case, have not been served and therefore they have not yet requested the Attorney General to represent them. The only facts which are in the record are those alleged by respondent in the complaint.

STATEMENT OF FACTS

The Men's Advisory Council of California Men's Colony, West Facility (CMC), Unit II was created by Warden's General Order Number 38. As described in the complaint, the association has the following purpose and objectives:

(A) To promote the welfare of the inmates through their duly elected representatives, to analyze and properly present to the Program Administrator ("P.A.") and the Warden/Chief Deputy Warden, recommendations which may, upon approval, lead to the common and mutual benefit of all inmates of CMC.

(B) To provide inmates of CMC with representation and a voice in administrative deliberations and decisions affecting the welfare and best interest of all inmates.

(C) To provide the Warden/Chief Deputy Warden and institution administrative staff with a means whereby administrative actions, and the reasons for these actions, may be communicated and understood by the general inmate population.

The members of the Men's Advisory Council are elected from the general prison population. Under Warden's Order No. 38, the Men's Advisory Council is not authorized to create an account or to collect funds.

Since 1949, the Department of Corrections of the State of California had maintained a program, reflected in

Director's Rules Section 3180, of providing free tobacco to inmates who are without funds to purchase it. On June 16, 1989 the Department issued a memorandum which discontinued this program.

Because there are incarcerated persons with an addiction to nicotine, discontinuing the distribution of free tobacco to these inmates forces them to support their addiction in other ways. Some inmates in California Men's Colony, West Facility, Unit II have been observed scavenging cigarette butts off sidewalks, ditches, gutters, and underneath dormitory steps. These practices, as well as the practice of lighting one cigarette and allowing many inmates to take turns smoking it, create a dangerous health risk by increasing the possibility of transmitting AIDS[2/] and other infectious diseases. In addition, indigent inmates may become indebted to other inmates in exchange for cigarettes, thereby risking the health and safety of those individuals. The Men's Advisory Council submitted an administrative appeal to the Warden of

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2. This and other factual assertions are presently uncontested in the record, but it must be remembered that this matter went to the lower appellate court before any discovery was undertaken or any dispositive motions were made. Moreover, there has been no opportunity to challenge the constitutional standing of the association to assert its members' rights. See Warth v. Seldin, 422 U.S. 490, 510 (1975). Finally, the issue of whether the discontinuance of free tobacco constitutes a violation of the Eighth and Fourteenth Amendments or is a frivolous legal claim under section 1915(d) is not discussed infra. Neitzke v. Williams, 490 U.S. 319, 325 (1989).

California Men's Colony, West Facility, requesting that distribution of free tobacco to indigent inmates be resumed. The appeal was denied on August 25, 1989.

The Men's Advisory Council attempted to file a complaint for violation of civil rights with the United States District Court for the Central District of California, through the Council's chief officer, William Cochran. The complaint named as defendants: James Rowland, Director of the California Department of Corrections; James H. Gomez, Chief Deputy Director of the California Department of Corrections, Sara Bruce, Chief of the Regulations and Policy Management Unit of the California Department of Corrections; and Leslie Bandaccari, an employee of the California Department of Corrections. The Men's Advisory Council claims that its members' federal rights were violated when the defendants repealed section 3180 prior to submission and action by the Office of Administrative Law, as required by California Government Code Section 11349. Further, the Men's Advisory Council claims that the defendants violated the Council's members' Eighth Amendment rights by creating conditions which cause mental, physical, and emotional deterioration. The Men's Advisory Council sought only declaratory and injunctive relief.

With its complaint, the Men's Advisory Council filed a motion for leave to proceed in forma pauperis, together with an affidavit executed by the Council's Chairman, William Cochran. The declaration was a statement of Cochran's poverty. On December 15, 1989, a United States Magistrate recommended that the in forma

pauperis application be denied due to an inadequate showing of poverty. On December 22, 1989, the district court followed that recommendation and ordered that the application be denied. William Cochran, Chairman of the Men's Advisory Council, then requested reconsideration of the court's denial of leave to proceed in forma pauperis. Judge Takasugi denied the request for reconsideration, but indicated that the court would consider an amended application which included details of each individual's indigency.

On April 18, 1990, the Men's Advisory Council, through Cochran, filed a notice of appeal with the United States District Court for the Central District of California. The Men's Advisory Council also submitted a motion and affidavit to appeal in forma pauperis, which was denied by the district court on April 19, 1990. On July 20, 1990, the court of appeals, on its own motion and under 28 U.S.C. section 1915(d), appointed present counsel to represent the Men's Advisory Council. The court also granted the motion for leave to appeal in forma pauperis.

SUMMARY OF THE ARGUMENT

The Ninth Circuit, having accepted the logic of two district court opinions and rejected the opinions of two circuit courts and three district courts, created a split between the circuits as to the issue of whether organizations, be they associations or corporations, may be granted in forma pauperis status under section 1915(a). The sole circuit court minority opinion, CMC, states that because Congress did not explicitly consider the issue of

whether organizations may have such status when it amended section 1915(a) to refer to "persons" instead of "citizens", and because section 1 includes such organizations as part of its omnibus definition of "persons", Congress must have intended that such organizations be "persons" within the meaning of section 1915(a). The majority position holds that the legislative history shows that Congress meant only one thing when it amended the statute. That intent was to extend the benefits of section 1915(a) to resident aliens. The Ninth Circuit's extension of section 1915(a) on the basis of this single-minded legislative history is simply building policy upon a fiction or pretext. At the very least, Congress has not spoken on the issue and our courts should not improvise on the basis of such silence.

Aside from the legislative history, substantial procedural questions flow from the decision, including vexing problems of indigency tests and standing. None of these questions is answered in the opinion, and the complexity of these issues suggests that no court could reasonably implement a scheme for permitting organizations to apply for in forma pauperis status without Congress' involvement. The ramifications of such a major procedural change such as that announced in CMC cannot be decided on a case by case basis.

ARGUMENT

ASSOCIATIONS ARE NOT ENTITLED TO IN FORMA PAUPERIS STATUS UNDER 28 U.S.C. SECTION 1915

The underlying circumstances of this case are undisputed in the record, as the sole pleading in the record is the complaint. Further, there is a small and discrete body of law and legislative history which all the parties, the circuit court, and other circuit courts which have considered the subject agree is relevant.

Nevertheless, there is no unanimity as to whether section 1915(a) permits associations[3/] to proceed in forma

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3. There may be some confusion as to terminology without a further definition of terms. The following definition of "association" is derived from Black's Law Dictionary (4th ed. 1951):

> The act of a number of persons in uniting together for some special purpose or business. The persons so joining. It is a word of vague meaning used to indicate a collection of persons who have joined together for a certain object . . . An unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise . . . . It is not a

pauperis.[5/] The Ninth Circuit, having determined that there is a split among the circuits, has in candid fashion considered both sides and chosen the minority view, i.e. that associations may proceed in forma pauperis. CMC at 858. This Court must resolve the manifest conflict among the circuits in the interpretation of the in forma pauperis statute and declare a uniform rule for the guidance of the district courts in light of the legislative history and this Court's own independent power to prescribe procedures for the efficient administration of the federal courts.[2/]

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legal entity separate from the persons who compose it . . . .

4. Section 1915 appears to be a breeding ground for these peculiar and seemingly unavoidable procedural disputes. *See* Hernandez v. Denton, No. 90-1846 [section 1915(d)].

5. No constitutional issue is implicated here. The benefits of in forma pauperis are "entirely statutory." Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963), cert. den. 375 U.S. 845 (1963); Brown v. Johnston, 99 F.2d 760 (9th Cir. 1938).

A. The legislative history of section 1915(a) provides no basis for permitting associations to proceed in forma pauperis.

As outlined in CMC, the crucial issue is whether the word "person" in 28 U.S.C. section 1915(a) is interpreted to include "corporations, companies [and] associations" as defined in 1 U.S.C. section 1.[6/] To decide that, it is necessary to establish the intent of Congress when it enacted that language. Few courts have addressed this question, and those few have disagreed, but the legislative history is not in dispute. See Note: Proceeding In Forma Pauperis in Federal Court: Can Corporations Be Poor "Persons"?, 62 Cal.L.Rev. 219 (1974).

Before 1959 only a "citizen" could benefit from section 1915 and it was settled law that a corporation was not a citizen for purposes of obtaining in forma pauperis

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6. CMC assumes that section 1 is the only possible source for definition of "person". By its own terms, section 1 has no universal pretentions. The section 1 definition is assumed to apply "unless the [statutory] context indicates otherwise". 1 U.S.C. section 1. If the context of the statute in question indicates a different meaning for "person", the statute-specific interpretation should be used. Cf. Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991) [fetus, upon birth, is a "person" within the meaning of section 1983]; U.S. v. Martin, 866 F.2d 972 (8th Cir. 1989) [drug store is "person" within meaning of 18 U.S.C. section 2118(b)].

status. Atlantic S.S. Corp. v. Kelley, 79 F.2d 339, 340 (5th Cir. 1935); Quittner v. Motion Picture Producers & Distributors of America, Inc., 70 F.2d 331, 332 (2d Cir. 1934). In 1959, section 1915 was amended by substituting the word "person" for "citizen," and the legislative history is clear that the purpose of this change was only to permit resident aliens to sue in forma pauperis. However, section 1 provides that in "determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word 'person' . . . include[s] corporations, companies, associations . . . ." The question, then, is whether Congress, when it adopted the word "person," intended that word to extend the coverage of section 1915 to all entities listed in section 1 or merely to resident aliens.

The primary argument for the inclusion of associations, companies or corporations within section 1915(a) was made by Chief Judge Bazelon in his dissenting opinion in SOUP Inc. v. FTC, 449 F.2d 1142, 1143 (D.C. Cir. 1971). The Chief Judge argued that Congress should be deemed to have been aware of section 1 when it amended section 1915(a), and that there was no indication in the legislative history of the 1959 amendment to indicate otherwise.

Two district courts have followed Judge Bazelon's lead, both phrasing their arguments in double negatives. "Neither the language nor the legislative history of § 1915(a) indicates that a corporation composed of and serving primarily poor persons should not be allowed to proceed in forma pauperis the same as an indigent

individual." River Valley, Inc. v. Dubuque County, 63 F.R.D. 123, 124 (N.D. Iowa 1974). "In this Court's view, neither the words of the statute nor its legislative history can be read to attribute to Congress an intent not to include corporations of whatever nature within the meaning of the word 'person' in this statute. [Emphasis in original.]" Harlem River Consumers Coop. v. Associated Grocers, 71 F.R.D. 93, 95 (S.D. N.Y. 1976).

The courts of appeals of two circuits and three district courts, including Judge Bazelon's own court, have rejected this reasoning. FDM Mfg. Co. v. Scottsdale Insurance Company, 855 F.2d 213, 214-215 (5th Cir. 1988); SOUP Inc. v. FTC, 449 F.2d at 1142-1143; Sears Roebuck & Co. v. C.W. Sears Real Estate, 686 F.Supp. 385, 386-388 (N.D. N.Y. 1988), aff'd. 865 F.2d 22, 23 (2d Cir. 1988); MOVE Organization v. U.S. Dept. of Justice, 555 F.Supp. 684, 690-692 (E.D. Penn. 1983); Honolulu Lumber Co. v. American Factors Ltd., 265 F.Supp. 578, 580-581 (D. Hawaii 1966), aff'd. on other grounds, 403 F.2d 49 (9th Cir. 1968). Aside from Honolulu Lumber, which predated SOUP, all of these cases considered and specifically rejected the Bazelon argument.

Petitioners rely on the majority rule. The legislative history detailed in the majority cases provided "compelling evidence" of Congressional intent. See generally 1959 U.S. Code Cong. & Admin. News 2663-2666. These courts found that the sole reason for the 1959 amendment was to allow resident aliens to proceed in forma pauperis and that there was no indication whatsoever that Congress intended to extend section 1915 to associations and

corporations.

> [T]he [in forma pauperis] statute, until its amendment in 1959, used the word "citizen" rather than "person." Hence, it was clear, before 1959, that a corporation would not be deemed a citizen for purposes of [in forma pauperis] status. . .
>
> The 1959 amendment to section 1915(a) changed only one word-from "citizen" to "person". The only reason given, in the legislative history, for the change was to grant [in forma pauperis] status to aliens. See S.Rep. No. 947, 86th Cong., 1st Sess. 2-4 (quoting H.R. Rep. No. 650, 86th Cong., 1st Sess. 2-3 (1959)), reprinted in 1959 U.S. Code Cong. & Ad. News 2663, 2664-65 (cited in MOVE Org., 555 F.Supp. at 691 n. 22).
>
> This legislative history is convincing. We would be impermissibly reading more into the statute than Congress intended if we were to hold that the 1959 amendment added corporations as well as aliens to the list of those entitled to seek [in forma pauperis] status. While there may be perfectly sensible policy grounds for allowing financially strapped corporations to proceed [in forma pauperis], we must leave it to the legislative branch to make that determination. As Judge Giles states in MOVE Org., "although the policy analysis . . . may be a valid method of common-law rulemaking, it is inappropriate as a method of construing this statute. . . . It gives the word 'person' a meaning which cannot reasonably found in the intent of Congress" 555 F.Supp. at 692.

FDM Mfg. Company v. Scottsdale Ins. Co., 855 F.2d at 214; see Sears Roebuck & Company v. C.W. Sears Real Estate, 686 F.Supp. at 388.

Congress has not spoken on this issue and courts are not free to fashion policy in Congress' name when Congress has been silent. "Ordinarily, 'Congress' silence is just that -- silence.'" Community for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989). "[C]aution must temper judicial creativity in the face of legislative . . . silence." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980). In the instant case, silence is an insufficient basis for concluding that Congress intended to reverse the pre-1959 interpretation of section 1915(a). Surely such a dramatic reversal in policy requires an explicit disowning. The legislative history shows Congress' attention was directed to an entirely separate problem, resident aliens, and the issue of organization in forma pauperis standing never was, even in the most indirect way, considered by Congress.

Moreover, "[i]n resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." Schmid v. U.S., 436 F.2d 987, 992 (Ct. Cl. 1971) (Nichols, J., dissenting),

cited with approval in Cass v. U.S., 417 U.S. 72, 83 (1974). Even if respondent's theory is that Congress did not address the issue through inadvertence, this is no basis for a court's declaration of what that intent would have been had Congress actually considered the matter. Such a court interpretation would simply be legislation upon a pretext. Congress should not be deemed to have made a policy reversal on a matter of which it was totally ignorant.

Neither silence nor inadvertence can be interpreted as Congressional intent, given the 1959 legislative history. Under these circumstances, to permit associations to litigate in forma pauperis is to create policy without benefit of Congressional authorization.

B. The instant decision creates immense practical problems of administration which remain unanswered.

The legal authority contrary to the Ninth Circuit's holding is significant. But there are practical effects of the opinion on the administration of justice in the district courts which should also be considered. CMC's failure to address numerous ancillary procedural issues is less an indication of the diligence of the court below than a sign that courts are not equipped to legislate. CMC postpones these procedural problems to another day and leaves the district courts to deal with a caseload which is sure to rise and for which there is no systematic guidance.

The primary problem is the test for indigency. The Ninth Circuit chose to defer the issue because the Men's Advisory Council could not have assets by the terms of its organizational grant. This is a singular condition which has no bearing on the majority of the potential organization plaintiffs. Yet the court did not "delineate the procedure by which . . . courts are to make that indigency determination". Indeed, the court eschewed "a comprehensive test for determining indigency" and did not decide "the relevance of members' individual finances in determining an association's indigency." CMC at 859, n.5. In short, the court admitted that an entirely new test of indigency must be developed for the associations it freed to pursue litigation in their own names and then it declined to state the terms of the new test or whether one test would resolve the matter.

For the courts denying section 1915 to organizations, determination of poverty was a major concern. The court in each case, except FDM Mfg. Company, either pierced the corporate veil or said it would have to do so if organizations were covered by section 1915. The problem is most clearly stated in Sears Roebuck & Company v. C.W. Sears Real Estate, 686 F.Supp. at 388:

> In addition to this legislative history, another consideration weighs against permitting corporations to reap the benefits of section 1915. If corporations were allowed to proceed in forma pauperis, there would exist the prospect that stockholders of a closely-held corporation might try to hide behind a corporate veil in order to avoid the costs of litigation. This danger was touched upon in MOVE Organization, 555 F.Supp. at 691, and Honolulu Lumber, 265 F.Supp. at 581. That such a scenario would arise is so obvious that it is doubtful that Congress would not have provided some guidance to the courts concerning how deeply they should look behind the corporate structure to determine indigency if it truly intended corporations to reap the benefits of the statute.

Clearly the lack of any specified test for indigency of a corporation, let alone an unincorporated association, presents immense practical problems for which CMC provides no remedy.

The possibilities for collusive evasion of standing, indigency and other requirements are evident. An "indigent" association, one which was forbidden to have assets, could be created solely for the purpose of acting as a litigant for non-indigent parties. Those declared vexatious litigants may proceed to litigate their meritless causes through an organization. Potential litigants may evade the carefully constructed procedure for certifying class actions. F.R.C.P. Rules 23, 23.2. Rather than proceeding as a class, individual related plaintiffs will proceed as ad hoc organizations. Discovery will be needlessly encumbered by the necessity to search for individuals with standing and with true cases and controversies. Our district courts should not be confronted with a myriad of loose confederations which are in forma pauperis litigation agencies in perpetuity for whatever individual grievances some number of its members might have.

If the corporation presents a substantial problem as an in forma pauperis plaintiff, a less formal organizational structure such as a voluntary unincorporated association presents a greater danger. Such an association does not necessarily meet the formal state standards for incorporation and the absence of compliance with such standards amplifies the danger pointed out in the Sears Roebuck case. The absence of such formalities implies an amorphousness inconsistent with efficient judicial administration. Yet CMC assumes the distinction is of no importance. CMC at 857, n. 3.

Needless to say, no further discussion of the possible

distinctions between corporations and associations is made in CMC. But, for example, a corporation board may vote to proceed with litigation and if this is done, there is no dispute that the vote represents the shareholders. Moreover, it may be determined that the board vote is the appropriate mode for authorization of the action by reference to the corporation charter. The formal corporate structure embodied in the corporation charter, read within the context of the state corporation laws, leaves no doubt as to the legitimacy of the corporation's initiation of the legal action. However, if the non-natural plaintiff is not incorporated, there are no ready means to determine whether the litigation is authorized and whether members of the group may be assessed individual shares of sanctions or receive pro rata shares of any judgment or settlement.

Other unanswered questions abound. For example, a corporation cannot appear pro se and must litigate through an attorney, and this rule is "venerable and widespread". Jones v. Niagra Frontier Trans. Auth., 722 F.2d 20, 22 (2d Cir. 1983); Sears Roebuck & Company v. C.W. Sears Real Estate, 686 F.Supp. at 386, n. 1. Both the Ninth Circuit and the California state courts honor this rule (Taylor v. Knapp, 871 F.2d 803, 806 (9th Cir. 1989), cert. den. 493 U.S. 868 (1989); Rogers v. Municipal Court, 197 Cal.App.3d 1314, 1318, 243 Cal.Rptr. 530 (1988)), and there is no case contrary to the rule. See Southwest Express Co. v. ICC, 670 F.2d 53, 55 (5th Cir. 1982); Strong Delivery Ministry Assn. v. Bd. of Appeals, 543 F.2d 32, 34 (7th Cir. 1976); Hawkeye Bank and Trust v. Baugh, 463 N.W.2d 22, 25-26 (Iowa 1990); Walacavage

v. Excell 2000, 480 A.2d 281, 284 (Pa. 1984); Oahu Plumbing v. Kona Construction, 590 P.2d 570, 572-573 (Haw. 1979).

The rationale for the rule is simple. As stated in Jones at 22, a corporation appearing pro se without attorney representation may lack the necessary professional skills and ethics. The conduct of litigation by a non-lawyer "creates unusual burdens not only for the party he represents but as well for his adversaries and the court." It does not appear that associations are better equipped to appear in propria persona than corporations, and therefore no association should appear without a lawyer representing it. This is not an insignificant issue, but no mention of this problem is made in CMC.

An association, unlike a corporation, is not a legal entity unto itself. Therefore, this Court has devised standing rules which govern the right of associations to sue in a representative capacity, as opposed to the ability to sue where the organization itself is the entity whose rights are in question. Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 343 (1977) permits non-natural persons to file section 1983 actions on behalf of their members if three conditions are met:

> [An] association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief

request requires the participation of individual members in the lawsuit.

These standing rules qualify and restrict the "representative" actions which may be prosecuted by an association or corporation. Thus, in the instant case, the Men's Advisory Council could not bring the action because participation of the individual users of tobacco would be necessary, assuming, as is logical, not all Men's Advisory Council members used tobacco. The third Hunt condition is violated. Moreover, the organization itself and a portion of its members do not consume tobacco and would not have standing to sue in their own right. To put it another way, not all Men's Advisory Council members could sue in their own right, and therefore the organization cannot sue for them under the first Hunt condition. The same would be true if the Men's Advisory Council were complaining of lack of weight training equipment, kosher food, or any of the many features of prison life which do not necessarily relate to the confinement of every prisoner.

These very stringent standing requirements limit association in forma pauperis status to those cases where the entire membership, and hence the organization itself, is directly affected, assuming the second Hunt condition is fulfilled. CMC contains no discussion of standing and it may be that the Ninth Circuit assumed that any complaint which did not meet the Hunt standards would be deemed frivolous under section 1915(d), i.e. containing no arguable legal cause, and dismissed. Neitzke v. Williams, 490 U.S. at 325; see FDM Mfg. Company v. Scottsdate Ins. Co.,

855 F.2d at 215; Harlem River Consumers Coop. v. Associated Grocers, 71 F.R.D. at 97-98. However, the Hunt requirements are such an integral part of determining in forma pauperis status that the failure to discuss this issue is a significant omission which can and will lead to substantial future litigation.

The minority rule announced in CMC is not one which will afford the district courts much leisure, and if the Ninth Circuit is "loath to fetter the discretion of future courts" (CMC at 859), at least it may be said that that future is not far off. The Ninth Circuit has expanded the scope of section 1915(a) in a manner which will inevitably increase the number of in propria persona section 1983 cases. We need not rely on empirical verification of the proposition that if a decision increases the number of possible plaintiffs who may proceed in forma pauperis, those plaintiffs will file their cases because there is no economic incentive not to file. Moreover, the obvious advantages given to association plaintiffs by the Ninth Circuit in evading the requirements of class certification, avoiding vexatious litigant determinations, and complicating discovery insure that there will be no reticence on their part to proceed.

Any expansion of the number of possible defendants will exert a hydraulic pressure on our overburdened trial courts, at least in the single circuit which permits association suits in forma pauperis. The total number of prisoner civil rights cases increased 1600 percent during the 20-year period ending in 1987, and the number of these cases which were meritorious was very small, both

proportionately and absolutely. Hernandez v. Denton, 861 F.2d 1421, 1431 (9th Cir. 1988) (Aldisert, J., dissenting); Note: Controlling and Deterring Frivolous In Forma Pauperis Complaints, 55 Fordham L. Rev. 1165 (1987); Feldman, Indigents in the Federal Courts, 54 Fordham L. Rev. 413 (1985); Turner, When Prisoners Sue, 92 Harvard L. Rev. 610 (1979). Under these extreme caseloads, any delay in reversing CMC will result in a radical increase in the number of in forma pauperis cases in the Ninth Circuit and any other circuits which choose to adopt CMC.

CONCLUSION

The legislative history of section 1915 offers no support to the inclusion of organizations within its coverage, and such an inclusion would create serious and unresolved problems of verification of poverty, standing and case and controversy. Therefore, this Court should reverse the holding of the Ninth Circuit.

DATED: April 10, 1992

Respectfully submitted,

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STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On April 10, 1992, I served the attached **PETITIONER'S BRIEF ON THE MERITS** in Rowland, et al. v. California Men's Colony, Unit II Men's Advisory Counsel, No. 91-1188, by placing a true copy thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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Subscribed and sworn to before me this 10th day of April, 1992.

Notary Public in and for said County and State

LUCINDA SEATON
NOTARY PUBLIC - CALIFORNIA
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My Commission Expires 3/3/93

No. 91-1186

Supreme Court, U.S.
FILED
MAY 28 1992
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In The

Supreme Court of the United States

October Term, 1991

JAMES ROWLAND, et al.,

Petitioners,

v.

CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADVISORY COUNCIL,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Was the court of appeals correct in concluding that 28 U.S.C. § 1915(a), which permits a "person" to litigate as an indigent, authorizes indigent associations to proceed *in forma pauperis*, given that 1 U.S.C. § 1 expressly defines "person" to include associations and there is no indication that Congress intended to deviate from this standard statutory definition?

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STATUTES INVOLVED

This case involves the construction of 28 U.S.C. § 1915(a). As explained in this Brief, this Court must employ 1 U.S.C. § 1 to construe § 1915. Portions of these two statutes are contained in the Petitioners' Brief on the Merits at page 2. The statutes are reprinted in full in the Appendix to this Brief.

STATEMENT OF THE CASE

The Men's Advisory Council is an association of state prison inmates incarcerated in Unit II of the California Men's Colony, West Facility. Complaint, p. 4, ¶ 7; ER. 4.[1]

The association was formed by inmates, acting at the behest of the Warden. *Id.* As described in Warden's General Order Number 38, which authorized the Men's Advisory Council, the Warden sought an organization that would (1) "promote the welfare of the inmates through their duly elected representatives," (2) give inmates "representation and a voice in administrative deliberations and decisions affecting the welfare and best interests of all inmates," and (3) provide the Warden with a means to communicate administrative decisions to inmates. *Id.* The members of the Men's Advisory Council are elected from the general prison population. *Id.*

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[1] On March 23, 1992, the Court granted the Petitioners' Motion to Dispense With Printing the Joint Appendix. Citations in this Brief are to the titles and pages of the pleadings in the district court. The district court pleadings were also reproduced in the Excerpts of Record in the court of appeals. "ER. ___" refers to the Excerpts of Record, at page ___.

For many years, the State has provided tobacco to indigent inmates. *Id.*, p. 6, ¶ 16; ER. 6. In June, 1989, the California Department of Corrections abandoned its tobacco program. *Id.*, pp. 6-7, ¶¶ 18-19; ER. 6-7. The Men's Advisory Council pursued several administrative appeals to overturn the new policy. The appeals were denied. *Id.* (Exhibit A), pp. 17-22, ER. 17-22.

Serving as a "voice" for the inmates (*id.*, p. 2; ER. 2),[2] the Men's Advisory Council attempted to file a Complaint alleging civil rights violations. *Id.*; ER. 1. The Complaint named as defendants the Warden, the Director of the California Department of Corrections, and other state officials. *Id.*, p. 5, ¶¶ 8-13; ER. 5. As described in the Complaint, the defendants violated the Eighth and Fourteenth Amendment rights of inmates in the institution. *Id.*, pp. 11-13, ¶¶ 28-34; ER. 11-13. The Men's Advisory Council did not request monetary damages, but sought only declaratory and injunctive relief. *Id.*, p. 14, ¶¶ 1-5; ER. 14. The Council also sought an order to prevent any reprisals for the filing of the lawsuit. *Id.*, p. 14, ¶ 5; ER. 14.

Along with the Complaint, the Men's Advisory Council filed a Motion for Leave to Proceed *In Forma*

[2] This is not the first time that the Men's Advisory Council at the California Men's Colony has participated in litigation as a "voice" for inmates. In *Dohner v. McCarthy*, 635 F. Supp. 408, 417 (C.D. Cal. 1985), the district court noted that "[inmates'] input through the Men's Advisory Council and the Litigation Team managing this action has clearly been responsible, significant and appropriate."

Pauperis. Motion; ER. 41-45. The Motion was accompanied by an Affidavit executed by the Council's Chairman, William Cochran. Motion; ER. 43-45. As explained in the Motion, the Men's Advisory Council has neither "funds nor an account established . . . to pay costs or give security to proceed with this action, but believes that [it is] entitled to the redress sought." *Id.*, p. 2; ER. 43. In his Affidavit, Mr. Cochran stated that there is "NO ACCOUNT FOR UNIT II MEN'S ADVISORY COUNCIL PER INSTRUCTION OF WARDEN." Motion, p. 3, ¶ 1b, ER. 44 (capitals in original).[3]

A United States Magistrate-Judge recommended that the *in forma pauperis* motion be denied, due to an "[i]nadequate showing of indigency." Order Re Leave To File Action Without Prepayment of Fees; ER. 46 (the Order is reprinted in Petitioners' Supplemental Appendix, at B-1). The district court followed the recommendation and denied the motion. *Id.*

Mr. Cochran, as Chairman of the Men's Advisory Council, asked the district court to reconsider the denial. Request [For] Reconsideration Of Denial To Proceed In Forma Pauperis; ER. 47-49. In the request, Mr. Cochran explained that the Council was established by the Warden and "represents the entire inmate population on UNIT II." *Id.*, p. 1, ER. 47. He cited case authority for the

[3] The State asserts that Mr. Cochran's Affidavit "was a statement of Cochran's poverty." *See* Petitioners' Brief on the Merits, p. 6. A fair reading of the Motion and Affidavit shows that Mr. Cochran alleged that the *Council* was without funds. He also explained that the *Council* was indigent because of the actions of one of the defendants, the Warden of the institution.

proposition that organizations can sue *in forma pauperis*. *Id.*, p. 2; ER. 48. He wrote that "the Warden has already stated that [the Council] is not allowed to have an account. Which [sic] precludes any fund raisers, or donations of money or any other asset which can be liquidated for costs to proceed with the prosecution of this matter." *Id.* Mr. Cochran also attached a memorandum from prison staff stating that the Council does not "and will not" have an account. *Id.*, p. 3; ER. 49. The district court denied the request for reconsideration, but stated that Mr. Cochran could submit "details of each individual's indigency." Order Denying Request For Reconsideration Of Denial To Proceed In Forma Pauperis; ER. 50 (the Order is reprinted in Petitioners' Supplemental Appendix at B-2).

The Men's Advisory Council appealed the denial of the *in forma pauperis* motion. Notice of Appeal; ER. 51.[4] The court of appeals instructed the parties to address the threshold question of whether 28 U.S.C. § 1915(a), which permits a "person" to litigate as an indigent, authorizes an organization to proceed *in forma pauperis*. *California Men's Colony, Unit II, Men's Advisory Council v. Rowland*, No. 90-55600, slip op. at 9492 n.1, 9493-94 (9th Cir. 1991). Following briefing and argument, the court held that "associations are 'persons' within the meaning of 28 U.S.C. § 1915(a), and hence that they may proceed in forma pauperis." *Id.* at 9500 (the court of appeals opinion, authored by Judge Charles E. Wiggins, is reprinted in the Appendix to the Petition For Writ of Certiorari).

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[4] The court of appeals requested that present counsel represent the Men's Advisory Council, pursuant to 28 U.S.C. § 1915(d). The court also granted the Council's motion for leave to appeal *in forma pauperis*, so that the issues on appeal could be resolved.

The court of appeals determined that the plain meaning of § 1915(a), when read with 1 U.S.C. § 1, permits associations to proceed *in forma pauperis*. *Id.* at 9495. The plain meaning may only be disregarded, the court noted, where there is a " 'clearly expressed legislative intention' contrary to that plain meaning." *Id.* at 9498 (quoting *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)). The Ninth Circuit rejected the State's legislative history argument, finding no evidence of any legislative intention contrary to the statute's plain meaning. *Id.* at 9496-98.

Because the Men's Advisory Council is prohibited by the defendants from maintaining any assets, the court of appeals determined that the Council had conclusively established its own indigency. *Id.* at 9499. "[N]ot only is the [Council] indigent, but that state of affairs is clearly not due to any effort on the part of its members to obtain the benefits of litigation without bearing the ordinary financial burdens." *Id.* The court therefore reversed the decision below and remanded the case so that the Men's Advisory Council could proceed *in forma pauperis*. *Id.* at 9500.

The State subsequently petitioned the court of appeals for rehearing and suggested a rehearing *en banc*. No judge requested a vote on the suggestion. Order, filed December 5, 1991 (the Order is reprinted in the Petitioners' Supplemental Appendix at B-3). The petition was denied and the suggestion was rejected. *Id.* The State then sought review in this Court.

SUMMARY OF ARGUMENT

This case presents a straightforward issue of statutory construction. A federal statute, 28 U.S.C. § 1915(a), states that an indigent "person" may proceed *in forma pauperis*. The term "person," while not defined in § 1915(a) itself, is defined in 1 U.S.C. § 1. According to § 1, "person" includes associations. Section 1915(a), when construed with § 1, unambiguously permits an association to proceed *in forma pauperis*. The only real question before this Court is whether the definition of "person" in § 1, a federal statute, is authoritative, or whether the Court may instead define "person" by referring to other, non-statutory sources.

As explained in Part I of the Argument, § 1 provides a mandatory definition of the term "person." When Congress enacted the present version of § 1915(a), the § 1 definition of "person" was already law. Congress defined "person" in the dictionary statute, § 1, so that it would not need to redefine the term with the passage of every new law. When Congress wants to enact a law with a different meaning of "person" than is contained in § 1, Congress expressly says so in the context of the new legislation. This Court has therefore held that the dictionary statute definition of person is mandatory and not merely permissive.

The State's construction of § 1915(a) rests exclusively upon its interpretation of the legislative history of the statute. This mode of analysis, however, is entirely at odds with established principles of statutory construction. " 'The starting point in statutory interpretation is

"the language [of the statute] itself." ' " *Ardestani v. Immigration and Naturalization Service*, ___ U.S. ___, 112 S.Ct. 515, 519 (1991) (quoting *United States v. James*, 478 U.S. 597, 604 (1986) and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Thus, an inquiry into the legislative history is not the first step in statutory interpretation; it is the last. And where the language of a statute is clear, it is inappropriate to review the legislative history at all.

In this case, the statutory language unambiguously states that indigent associations are permitted to proceed *in forma pauperis*. For this reason alone, the State's reliance upon the legislative history is misplaced. Moreover, even if this Court examines the legislative history, the history is silent on the question of whether indigent organizations can seek *in forma pauperis* status. Consequently, the legislative history does not provide any evidence that the clear statutory language is contrary to Congress' intent.

There is an additional reason to reject the State's construction of the statute. The State's construction would impermissibly burden the First Amendment rights of members of the Men's Advisory Council. Council members have a right to associate for the purposes of litigation, and denying permission to the Men's Advisory Council to proceed *in forma pauperis* infringes that right. It is well settled that statutes should be construed, whenever possible, to avoid raising serious constitutional questions.

The State also asks this Court to deny associations the ability to proceed *in forma pauperis* because of policy concerns. Part II of the Argument explains that the policy

concerns advanced by the State are insubstantial and, in any event, fail as a matter of law. Policy reasons cannot and do not provide any basis for a court to disregard the unambiguous language of a statute.

ARGUMENT

I. Section 1915(a) Plainly Permits Indigent Associations To Proceed *In Forma Pauperis*.

A. The unambiguous language of section 1915(a) provides that associations may sue *in forma pauperis*.

The court of appeals correctly concluded that 28 U.S.C. § 1915(a), when read in light of 1 U.S.C. § 1, is clear and unambiguous. Section 1915 provides, in relevant part:

> Any court of the United States may authorize the commencement . . . of any suit, . . . without prepayment of fees and costs or security therefor, by a *person* who makes affidavit that he is unable to pay such costs or give security therefor.

28 U.S.C. § 1915(a) (emphasis added; § 1915 is reprinted in full in the Appendix to this Brief). "Person" is, in turn, defined in 1 U.S.C. § 1. That section, which defines words used throughout the United States Code, states in relevant part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise – . . . . the words *"person"* and "whoever" *include* corporations, companies, *associations*, firms, partnerships, societies, and joint stock companies, as well as individuals.

1 U.S.C. § 1 (emphasis added; § 1 is reprinted in full in the Appendix to this Brief). The court of appeals correctly ruled that, when these two statutes are read together as required, § 1915 unambiguously permits organizations to proceed *in forma pauperis*.[5]

.There is no question that § 1915(a) must be construed in light of § 1. Section 1 is more than an informal guide to

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[5] The court of appeals was persuaded by the views expressed by Judge Bazelon in *S.O.U.P., Inc. v. Federal Trade Commission*, 449 F.2d 1142, 1143 (D.C. Cir. 1971) (Bazelon, C.J., dissenting). In that case, a private non-profit corporation was denied permission to proceed *in forma pauperis*. Dissenting, Judge Bazelon discussed the mandatory rule of § 1. He determined that corporations may proceed *in forma pauperis*, and he would have found that S.O.U.P. was indigent under § 1915. *Id.* at 1144-45 (Bazelon, C.J., dissenting).

Two other courts agree with Judge Bazelon and the court of appeals' decision in this case. *See Harlem River Consumers Cooperative v. Associated Grocers of Harlem*, 71 F.R.D. 93 (S.D.N.Y 1976) (permitting a non-profit corporation to proceed *in forma pauperis*, and holding that § 1915 should be read in light of the definitions set forth in 1 U.S.C. § 1); *River Valley, Inc. v. Dubuque County*, 63 F.R.D. 123 (N.D. Iowa 1974) (same).

The Ninth Circuit's ruling is at odds with the decision of one other circuit court. *See FDM Manufacturing Co., Inc. v. Scottsdale Insurance Co.*, 855 F.2d 213 (5th Cir. 1988) (holding that the legislative history to § 1915(a) establishes that a corporation may not sue *in forma pauperis*). Contrary to the State's claims (*see* Petitioners' Brief on the Merits, p. 13), the majority in *S.O.U.P.* never reached the issue in this case. The majority assumed, *arguendo*, that a corporation could sue *in forma pauperis*, but denied permission to S.O.U.P. based on the financial data that it submitted. *S.O.U.P.*, 449 F.2d at 1142.

statutory construction. Section 1 is a federal statute and, like any other federal statute, it must be enforced. Although the Supreme Court has never authoritatively construed the word "person" in § 1915(a),[6] this Court has held that "dictionary statutes," such as § 1, provide definitions that must be applied to other statutes.

The most extensive discussion of this principle is in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). In that case, this Court considered the effect of the Act of February 25, 1871 (the "Dictionary Act"), which was the forerunner to 1 U.S.C. § 1. The Act was on the books when 42 U.S.C. § 1983, the statute construed in *Monell*, was enacted. At that time, the Dictionary Act provided:

> [I]n all acts hereafter passed . . . the word "person" may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense.

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[6] This Court has never expressly decided whether "person" in § 1915(a) includes corporations or associations. Without any explanation for its rulings, this Court has both granted and denied permission to artificial entities to proceed *in forma pauperis*. *Compare Model Cities Policy Board of Ann Arbor v. Lynn, Sec'y of Housing and Urban Development*, 411 U.S. 979 (1973) (granting motion) *with Schreibman v. Walter E. Heller & Co.*, 440 U.S. 931 (1979) (denying motion); *National Indian Youth Council v. Bruce*, 415 U.S. 946 (1974) (same); *Association For The Preservation Of Freedom Of Choice, Inc. v. Nation Co.*, 375 U.S. 899 (1963) (denying motion by 6-3 vote). More recently, and again without explanation, this Court has apparently adopted a policy preventing artifical entities from filing *in forma pauperis* motions in this Court. *See* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* 429-30 (6th ed. 1986).

Act of Feb. 25, 1871, § 2, 16 Stat. 431. In *Monell*, this Court rejected an argument that the Dictionary Act merely *permitted* the word "person" to include "bodies politic and corporate." Instead, "a mandatory use of the extended meanings of the words defined by the Act is . . . required for it to perform its intended function – to be a guide to 'rules of construction' of Acts of Congress." *Id.* at 689 n.53 (citation omitted). As this Court reasoned, "[w]ere the defined words 'allowable, [but] not mandatory' constructions . . . , there would be no 'rules' at all. Instead, Congress must have intended the definitions of the Act to apply across-the-board except where the Act by its terms called for a deviation. . . . " *Id.* (citation omitted).

Monell does not stand alone. This Court has repeatedly employed the terms in § 1 as mandatory definitions. In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), for example, the Court construed 25 U.S.C. § 194. That statute provides that in certain property disputes between a Native American and a "white person," the burden of proof rests upon the "white person." The Court applied § 1 and held that "white person" includes artificial entities as well as individuals. *Id.* at 666-67.[7] Similarly, in *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958), the Court held that partnerships could be held criminally liable under former 18 U.S.C. § 835, which permitted the

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[7] The *Wilson* Court utilized § 1 to interpret § 194 even though, as one justice later commented, "virtually every time we construe the word 'person' to include corporate or other artificial entities that are not individual, flesh-and-blood persons, some awkwardness results." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 83 (1989) (Brennan, J., dissenting).

government to prosecute "whoever" violated certain interstate commerce regulations. "Whoever" is defined along with "person" in § 1 to include partnerships. Section 835, the Court held, "must be read" in light of § 1. *A & P Trucking*, 358 U.S. at 123. *See also United States v. United Mine Workers*, 330 U.S. 258, 275 (1947) ("person," in Norris-LaGuardia Act, does not include sovereign, because the Dictionary Act definition does not include the government); *United States v. Union Supply Co.*, 215 U.S. 50, 54-55 (1909) (citing Dictionary Act and holding that "any person" in a criminal statute includes corporations).[8]

There are several reasons why Congress chose to define "person" in 1 U.S.C. § 1. Placing the definition in a single place in the United States Code makes it simpler for Congress to draft other statutes. As the court of appeals noted in this case, "Congress chose to codify the canons of statutory construction in 1 U.S.C. § 1 . . . so that it would be unnecessary to repeat these common principles of interpretation each time it enacts or amends a statute." *Men's Advisory Council*, slip op. at 9498.[9]

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[8] Other "dictionary statute" definitions have been routinely applied. *See Barr v. United States*, 324 U.S. 83, 91 (1945) (reading statute in light of rule, set forth in § 1, that words importing the singular include the plural); *United States v. Oregon and California R. Co.*, 164 U.S. 526, 541 (1896) (same); *cf. Norton v. Warner*, 321 U.S. 565, 571 (1944) (applying definition of "vessel" contained in 1 U.S.C. § 3); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (same).

[9] The court of appeals opinion was written by Judge Charles E. Wiggins, who served in the Congress from 1967 to

(Continued on following page)

Moreover, "it [has long been] well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687.[10] Thus, defining "person" to include associations and corporations establishes a default rule that reaches the correct result in the overwhelming majority of cases. It also represents a statement by Congress that, in most circumstances, individuals and all others included in the § 1 definition of "person" have similar rights and responsibilities under the law.

This Court must presume that Congress had § 1 in mind when it added the word "person" to § 1915(a). *See*

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1979. Felix Frankfurter expressed Judge Wiggins' sentiments another way: "Sometimes Congress supplies its own dictionary. It did so in 1871 in [the Dictionary Act by] defining a limited number of words for use as to all future enactments." Frankfurter, *Some Reflections On The Reading Of Statutes*, 47 Colum. L. Rev. 527, 536 (1947).

[10] *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (First Amendment freedom of speech extends to corporations); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (Fifth Amendment Double Jeopardy Clause applies to companies); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations are among the people protected against unreasonable searches and seizures under the Fourth Amendment); *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385, 392 (1920) (same); *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886) (corporations are "persons" within the meaning of the Fourteenth Amendment Due Process Clause); *United States v. Amedy*, 11 Wheat. 392, 410-13 (1826) (a business, whether or not incorporated, is a "person" within the meaning of a statute making it a crime to destroy a vessel that has an insurance policy underwritten by a "person"); *American Socialist Society v. United States*, 266 F. 212, 123 (2d Cir.) ("whoever," in criminal statute, includes a society), *cert. denied*, 254 U.S. 637 (1920).

Miles v. Apex Marine Corp., ___ U.S. ___, 111 S.Ct. 317, 325 (1990) ("[w]e assume that Congress is aware of existing law when it passes legislation"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (same); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) (same). In 1948, Congress enacted the current § 1 definition of "person." Act of June 25, 1948, ch. 645, § 6, 62 Stat. 683, 859. This definition of "person" has remained unchanged since 1948. It was on the books in 1959, the year that Congress amended 28 U.S.C. § 1915(a) to provide that a "person" may proceed *in forma pauperis*. *See* Act of September 21, 1959, Pub. L. No. 86-320, 73 Stat. 590 (amending § 1915(a)). Congress is also presumed to legislate with knowledge of this Court's rules of statutory construction. *McNary v. Haitian Refugee Center, Inc.*, ___ U.S. ___, 111 S.Ct. 888, 898 (1991). Thus, given this Court's prior decisions applying § 1 to other legislation, in amending § 1915(a) by inserting the word "person," "Congress was fully aware that [the statute] would be interpreted to cover artificial entities as well as individuals." *Wilson*, 442 U.S. at 667.

The definition contained in § 1 must be applied whenever Congress enacts a law using the word "person." The only exception to this rule of construction is set forth specifically within the text of § 1: in determining the meaning of a statute, "person" includes associations "unless the context indicates otherwise." As explained in *Monell*, "context" refers to the complete *text* of a statute. In *Monell*, the Court held that the Dictionary Act must be applied unless the statute being construed, *"by its terms,"* calls for a deviation. 436 U.S. at 689 n.53 (emphasis

added).[11] The Court applied the Dictionary Act because the terms of the Civil Rights Act did not call for a restricted interpretation of the word "person." *Id.* at 689-90 n.53.

There are two ways in which the terms of a statute may indicate that "person" means something other than the § 1 definition. First, a statute may expressly provide a different definition for the word "person," and this specific definition will control. Second, the overall text of a statute may indicate that "person" has some unique meaning.

Many statutes fall within the first category. These statutes show that when Congress intends a different meaning of "person" than is provided in § 1, the legislature takes care to craft a specific definition. *See, e.g.*, 11 U.S.C. § 101(41) ("person," in Bankruptcy Code, "includes individual, partnership, and corporation, but does not include governmental unit, . . . "); 12 U.S.C. § 3401(4) ("person," in Right to Financial Privacy Act of 1978, "means an individual or a partnership of five or fewer individuals");[12] 26 U.S.C. § 7655 ("person," in

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[11] The section of the Dictionary Act discussed in *Monell* stated that it was to be applied "unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, § 2, 16 Stat. 431. Section 1 states that it applies "unless the context indicates otherwise." There is no meaningful difference between these two phrases.

[12] This is a good example of Congress' use of a narrower definition of "person" than is contained in § 1. The Right to Financial Privacy Act protects against the unwanted disclosure of the bank records of a "customer," who is defined as a

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Internal Revenue Code, means "an individual, a trust, estate, partnership, association, company or corporation"); 30 U.S.C. § 1511(d) (in laws relating to geothermal energy, " 'person' includes municipalities, electric cooperatives, industrial development agencies, nonprofit organizations, and Indian tribes, as well as the entities included within such term under section 1 of Title 1"); 31 U.S.C. § 5312(a)(4) (in currency transaction reporting statute, " 'person,' in addition to its meaning under section 1 of title 1, includes a trustee, a representative of an estate and, when the Secretary prescribes, a governmental entity").[13] Because these statutes contain specific definitions of the word "person," the "context" of these statutes indicates clearly that the § 1 definition should not be applied.

The second circumstance in which the "context" indicates that § 1 is inapplicable is where the overall text of a statute reveals some special meaning of a word. This use

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"person." 12 U.S.C. §§ 3401(5), 3402, 3403. Congress defined "person" in § 3401(4) to include only individuals and small partnerships; corporations and associations are not included in the definition. In *Spa Flying Service, Inc. v. United States*, 724 F.2d 95 (8th Cir. 1984), the court of appeals held that because Congress defined "person" narrowly in the Act, the broad definition of "person" in 1 U.S.C. § 1 does not apply. Hence, the Right to Financial Privacy Act does not protect the financial records of a corporation.

[13] *See also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 n.22 (1989) ("Where Congress did intend that [Indian Child Welfare Act] terms be defined by reference to other than federal law, it stated this explicitly").

of context is not unique to § 1; courts often look to the complete text of a statute to give meaning to a word or phrase. In *United States Department of Energy v. Ohio*, 60 U.S.L.W. 4325 (U.S. April 21, 1992), for example, this Court construed the term "sanction." Noting that "[t]he term's context . . . may supply a clarity that the term lacks in isolation," *id.* at 4329 (citing *Shell Oil Co. v. Iowa Department of Revenue*, 488 U.S. 19 (1988)), the Court examined the statute as a whole. The Court drew upon the other usages of the word "sanction" in the same statute and also found significant the placement of the term "sanction" within the overall structure of the statute. *Id.* at 4329-30. Similarly, in *Shell Oil Co.*, this Court assessed the purpose of two subsections of a statute by examining those subsections in the context of the entire section in which they appeared. 488 U.S. at 25-26.

In this case, nothing in the context of § 1915 indicates that "person" must be given a different meaning than is contained in § 1. Person is not given any specific definition in § 1915. Nor does the overall text of § 1915 indicate, explicitly or implicitly, that "person" can mean only a "natural person."[14] Because the context of § 1915 does not establish that "person" has a unique meaning, the definition of "person" contained in § 1 must be applied. Therefore, under unambiguous statutory language, "person" includes associations.

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[14] A statute providing, for example, that "no person shall marry his or her sibling" would, *by its terms*, exclude associations. The context of the statute would call for a different meaning of "person" than is contained in § 1, because only natural persons may marry. But no terms in § 1915 are in any way inconsistent with permitting associations to proceed *in forma pauperis*.

The State nevertheless urges this Court to use the legislative history to § 1915 to construct a different definition for "person." But there is no reason to turn to the legislative history in this case. Courts study legislative history to resolve statutory ambiguity. *Barnhill v. Johnson*, ___ U.S. ___, 112 S.Ct. 1386, 1391 (1992); *Toibb v. Radloff*, ___ U.S. ___, 111 S.Ct. 2197, 2200 (1991). As this Court recently stated:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut National Bank v. Germain, ___ U.S. ___, 112 S.Ct. 1146, 1149 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981); internal citations omitted); *see also Ardestani v. Immigration and Naturalization Service*, ___ U.S. ___, 112 S.Ct. 515, 519 (1991); *Norfolk and Western Railway Co. v. American Train Dispatchers Assoc.*, ___ U.S. ___, 111 S.Ct. 1156, 1163 (1991); *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Other than by referring to a split in authority, the State does not explain how § 1915(a) – when read with § 1 – is in any way ambiguous. Nor does the State explain how the legislative history to § 1915(a) may overcome clear statutory language.[15] Section 1915 is unambiguous, and this Court ought not examine the legislative history.

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[15] Most of the lower court cases upon which the State relies fail to follow established rules of statutory construction.

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B. The legislative history does not provide any basis to disregard unambiguous statutory language.

When the language of a statute is unambiguous, as it is here, there is only one other way in which legislative history may be used. A court may, in very rare instances, look for "clear evidence" that interpreting the statute literally "would thwart the obvious purposes" of the statute. *Mansell v. Mansell*, 490 U.S. 581, 592 (1989); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). Put another way, the legislative history may settle the construction of § 1915(a) only if it contains a " 'clearly expressed legislative intention' contrary to [the plain language], which would require [this Court] to question the strong presumption that Congress expresses its intent through the language it chooses." *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (citing *United States v. James*, 487 U.S. 597, 606 (1986) and *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Legislative history

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In each case, the court simply disregards the plain meaning of § 1915(a) in favor of the legislative history. *See FDM Manufacturing Co., Inc. v. Scottsdale Insurance Co.*, 855 F.2d 213, 214 (5th Cir. 1988); *Move Organization v. United States Department of Justice*, 555 F. Supp. 684, 690-92 (E.D. Pa. 1983); *Honolulu Lumber Co. v. American Factors, Ltd.*, 265 F. Supp. 578, 580 (D. Hawaii 1966); *see also Deuterium Corp. v. United States*, 21 Cl.Ct. 132, 136 (1990). Although the district court in *Sears, Roebuck and Co. v. Charles W. Sears Real Estate, Inc.*, 686 F. Supp. 385, 387-88 (N.D.N.Y. 1988), did note the rules of statutory construction, the court erred in holding that § 1 provides merely a permissive and not a mandatory definition.

can rebut this "strong presumption" only in " 'rare and exceptional circumstances.' " *Ardestani*, 112 S.Ct. at 520 (quoting *Rubin v. United States*, 449 U.S. 421, 430 (1981)). *Mansell*, *Ardestani*, *Griffin* and *Cardoza-Fonseca* illustrate just how narrow this use of legislative history must be, for in *none* of these cases did the legislative history permit the Court to ignore the plain language of the relevant statutes. This case does not even come close to presenting the sort of exceptional circumstances that warrant disregarding the language chosen by Congress.

The State's argument focuses upon the legislative history to the 1959 amendment to § 1915(a). First, the State claims that, prior to 1959, § 1915(a) did not permit artificial entities such as associations or corporations to proceed *in forma pauperis*. Petitioners' Brief on the Merits, pp. 11-12. Second, the State asserts that the legislative history is "silent" about whether the 1959 amendment to § 1915 "intended to reverse the pre-1959 interpretation of section 1915(a)." "Surely," the State contends, "such a dramatic reversal in policy requires an explicit disowning," *id.*, p. 15, and the legislative history shows that in amending § 1915(a), Congress considered only the difficulties of indigent aliens. *Id.* The State is wrong on both of these points.

First, contrary to the State's claim, it was unsettled whether artificial entities could proceed *in forma pauperis* prior to 1959. At that time, § 1915(a) provided that a "citizen" could seek *in forma pauperis* status. *See* Act of June 25, 1948, ch. 646, § 1, 62 Stat. 869, 954. The word "citizen" in § 1915(a) was never authoritatively construed

by this Court.[16] Only two courts of appeals ever considered whether an artificial entity could sue *in forma pauperis* under the previous version of § 1915(a), and both of those cases were wrongly decided.

In *Atlantic S.S. Corp. v. Kelley*, 79 F.2d 339, 340 (5th Cir. 1935) and *Quittner v. Motion Picture Producers & Distributors of America, Inc.*, 70 F.2d 331, 332 (2d Cir. 1934), the courts of appeals denied corporations' motions to proceed *in forma pauperis* on the grounds that corporations are not "citizens."[17] Although the Second Circuit cited no authority for its position, the Fifth Circuit erroneously relied in part upon *Bank of United States v. Deveaux*, 5 Cranch 61 (1809). In *Deveaux*, this Court had held that corporations were not "citizens" for the purposes of diversity jurisdiction. *Id.* at 86-87. In 1844, however, this Court reversed its prior decision in *Deveaux* and held that "a corporation . . . doing business in a particular State, is to be deemed to all intents and purposes as a person, . . . capable of being treated as a citizen of that State, as much as a natural person." *Louisville,*

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[16] Prior to 1959, this Court decided several motions by corporations attempting to proceed *in forma pauperis*. *See One, Inc. v. Oleson, Postmaster of Los Angeles*, 353 U.S. 979 (1957); *Brictson Manufacturing Co. v. Close*, 49 S.Ct. 92 (1928). The motions were denied without explanation. In *Roberts v. United States District Court For The Northern District Of California*, 339 U.S. 844 (1950), the Court held that the term "citizen" in § 1915(a) must be defined by federal and not state law. But at no time did this Court determine whether "citizen" included corporations or associations.

[17] *Atlantic* and *Quittner* involve statutes that were later recodified as § 1915(a).

Cincinnati, and Charleston R. Co. v. Letson, 2 How. 497, 558 (1844). As already noted above at page 13, it has long been understood that corporations are to be treated as natural persons for virtually all purposes. *Monell*, 436 U.S. at 687. Thus, the only circuit court decision that cited any authority in construing "citizen" relied in part upon a Supreme Court case that had long been overruled.

Thus, the State erroneously assumes that Congress understood "citizen" in the former version of § 1915(a) to mean something akin to "individual who is a citizen." The State goes on to argue that Congress would not have extended the *in forma pauperis* statute to artificial entities without some indication in the legislative history. Corporations, however, have long been deemed "citizens" and therefore, in 1959, members of Congress may well have believed that at least one form of artificial entity, corporations, could proceed *in forma pauperis*.[18] Thus, there is little basis for the State's position that granting *in forma pauperis* status to a organization represents a radical break from prior practice. It is not at all surprising that the legislative history does not discuss artificial entities and *in forma pauperis* proceedings.

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[18] When it inserted the word "person" in § 1915, Congress knowingly incorporated the definition contained in § 1. If Congress was aware of *Quittner* and *Atlantic S.S. Corp.*, the choice of "person" may reflect an intention to overturn those two cases. If Congress had intended to codify *Atlantic* and *Quittner*, Congress could have easily replaced "citizen" with a term such as "any individual," or "any natural person." *See* Comment, *Proceeding In Forma Pauperis in Federal Court: Can Corporations Be Poor "Persons"?*, 62 Cal. L. Rev. 219, 226 (1974).

Equally meritless is the State's argument that the legislative history of the 1959 amendment affirmatively demonstrates that Congress did *not* intend to grant *in forma pauperis* status to associations. In 1959, Congress replaced the word "citizen" in § 1915(a) with the word "person." Act of September 21, 1959, Pub. L. No. 86-320, 73 Stat. 590. The State places great weight on the fact that the Senate Report accompanying the amendment only addresses the ability of aliens to proceed *in forma pauperis*, and is silent on the issue of whether associations should also be permitted *in forma pauperis* status. *See* S. Rep. No. 947, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Admin. News 2663.[19] The silence in the legislative history is inconsequential. "[T]he absence of legislative history on [the reason for a statutory provision] is immaterial in light of the plain and precise language of the statute; Congress is not required to build a record in the legislative history to defend its policy choices." *Mansell*, 490 U.S. at 592; *see also Toibb*, 111 S.Ct. at 2201 ("[I]t makes no difference whether the legislative history affirmatively reflects [the legislative] intent").

This approach makes good sense, since it is not always possible to glean the intent of Congress from legislative history. In this case, we do not know whether a majority of Members of Congress passed the amendment with the *sole* intent of permitting aliens to proceed *in forma pauperis*.[20] It may well be that several legislators

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[19] *See also* 105 Cong. Rec. 13714 (1959); 105 Cong. Rec. 18909 (1959).

[20] Indeed, we do not even know how many legislators read the Senate Report. *See Wisconsin Public Intervenor v.*

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were motivated to amend § 1915(a) because they wished to permit aliens to proceed *in forma pauperis*. If so, the amendment accomplished everything those legislators desired; substituting "person" for "citizen" succeeded in extending to aliens the right to sue *in forma pauperis*. But it also did more. Under § 1, "person" includes associations as well as aliens and citizens. The State claims that legislators did not consider whether the amendment would permit associations to proceed *in forma pauperis*. Petitioners' Brief on the Merits, p. 15. Even if that assertion were true, it would not be a sufficient reason to disregard the statute. "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, ___ U.S. ___, 112 S.Ct. 527, 531 (1991) (citing *Toibb*, 111 S.Ct. 2197 (1991)).

The State's legislative history arguments must therefore be rejected. This Court cannot disavow the language of § 1915 merely because Congress did not repeat

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Mortier, ___ U.S. ___, 111 S.Ct. 2476, 2489 (1991) (Scalia, J., concurring) (noting that Committee action "does not necessarily say anything about what Congress as a whole thought." The members of the Committees represent only a small proportion of each house and, even if they agreed on the meaning of certain legislation, "[i]t is most unlikely that many Members of either chamber read the pertinent portions of the Committee Reports before voting on the bill"); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (finding "no reason to believe that any more than a handful of the Members of Congress" passed a bill on the basis of legislative history or floor debates).

in the legislative history what it said in the statute. Silence cannot establish that the unambiguous language of the statute is "demonstrably at odds with the intentions of its drafters. . . . " *Griffin*, 458 U.S. at 571. Under the clear language of § 1915, associations must be allowed to sue *in forma pauperis*.

C. The Court must construe section 1915(a) to permit associations to proceed *in forma pauperis*; any other construction would present serious constitutional questions.

The First Amendment and the Due Process Clause protect the ability of the members of the Men's Advisory Council to file a federal complaint. What the Council members can do individually they must be permitted to do as a group, for the First Amendment also protects the members' ability to associate for the purposes of litigation. The State's construction of § 1915(a) impermissibly burdens individual members' First Amendment rights. This is another reason to conclude that § 1915 permits indigent associations to proceed *in forma pauperis* in federal court. Any other construction would raise serious constitutional questions.[21]

Whenever possible, this Court should construe a statute to avoid conflicts with the Constitution. *Edward J.*

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[21] These constitutional issues were raised in the court of appeals. *See* Opening Brief of Plaintiff-Appellant, pp. 22-24; Appellees' Brief, p. 8; Reply Brief of Plaintiff-Appellant, pp. 3-6. The Ninth Circuit construed 28 U.S.C. § 1915(a) to include associations and, therefore, did not reach the constitutional claims.

DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop Of Chicago*, 440 U.S. 490, 500 (1979); *Johnson v. Robison*, 415 U.S. 361, 367 (1974). Congress is sworn to uphold the Constitution. This Court "will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties. . . . " *Edward J. DeBartolo Corp., supra*. A statute will be construed to avoid serious constitutional problems unless that construction "is plainly contrary to the intent of Congress." *Id.*; *see also Public Citizen v. United States Department of Justice*, 491 U.S. 440, 466 (1989) ("we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils"); *Catholic Bishop Of Chicago*, 440 U.S. at 500-01 (intent of Congress must be clearly expressed). This Court has previously applied this rule of construction to avoid resolving questions of whether a statute impermissibly burdens the First Amendment right of association. *See, e.g., Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961) (construing the Sherman Act to permit two or more people to associate to solicit governmental action, even though that action might produce a restraint upon trade or a monopoly).

Two provisions of the Constitution safeguard the ability of individual members of the Men's Advisory Council to file a federal lawsuit. First, litigation can be "a form of political expression," which is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429-30 (1963). The First Amendment is implicated when a litigant "[r]esort[s] to the courts to seek a vindication of

constitutional rights." *Id.* at 443-44. *See also In re Primus*, 436 U.S. 412, 428 (1978). Second, "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). This right of access applies in both criminal and civil cases. *Id.* at 822-23; *Turner v. Safley*, 482 U.S. 78, 84 (1987) (discussing the right in general); *Wolff v. McDonnell*, 418 U.S. 539, 578-80 (1974) (enforcing the right in a civil case); *Johnson v. Avery*, 393 U.S. 483 (1969) (enforcing the right in a habeas corpus case).[22]

While the United States Constitution protects the ability of individual Council members to file a lawsuit, the First Amendment also protects their right to associate for the purpose of litigation. "[I]mplicit in the right to

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[22] Because of these cases and others, the Petitioners are surely wrong in arguing that "[t]he benefits of in forma pauperis are 'entirely statutory.' " Petitioners' Brief on the Merits, p. 10 n.5 (citations omitted). Had Congress not enacted 28 U.S.C. § 1915(a), the United States Constitution would nevertheless require the federal courts to permit indigents to proceed *in forma pauperis* when those litigants seek to protect constitutional or fundamental rights. *See Bounds*, 430 U.S. at 824-25 (discussing affirmative financial obligations to assure all prisoners meaningful access to the courts); *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (Due Process Clause requires that indigents be permitted to seek a divorce without paying filing fees; divorce touches a fundamental right, and only the courts can grant a divorce); *see also Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 634-35 (1924) (construing an admiralty rule so as not to deprive indigent litigants of the right to pursue their claims); *but see United States v. Kras*, 409 U.S. 434, 443-45 (1973) (no right to *in forma pauperis* status in bankruptcy proceedings; bankruptcy is not a fundamental right).

engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). A long line of cases from this Court establish that individuals may associate for the purposes of litigation. *See United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 582-83 (1971); *United Mine Workers of America, District 12 v. Illinois State Bar Assoc.*, 389 U.S. 217, 222-23 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 8 (1964); *NAACP v. Button*, 371 U.S. at 430-31.

The right of the Council members to associate encompasses more than just the right to meet and promote an individual's litigation. The First Amendment protects the ability of a group to take action *as* a group. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control/ Coalition For Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981). In that case, this Court struck down a city ordinance that imposed a limit on contributions to committees formed to support or oppose ballot measures, where there was no such limitation upon individuals acting alone. *Id.* at 296. As the Court noted, there are some activities that are legal if engaged in by one person, yet illegal if performed in concert with others, "but political expression is not one of them." *Id.*; *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (an organization has the same right to engage in speech as an individual).

The right to be heard through an organization must be protected. Freedom of association guarantees the right of the people to make their voices heard. *Citizens Against Rent Control*, 454 U.S. at 295. Effective advocacy "is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). In fact, "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") v. Brock*, 477 U.S. 274, 290 (1986). Group speech provides a distinct and valued voice. Thus, this Court has acknowledged the advantages of suits by associations, both to the individuals represented and to the entire judicial system. *Id.*

There is another reason to protect suits by associations. Government acts may sometimes chill people from pursuing their legal remedies as individuals, but those same people may find strength to vindicate their rights through collective action. *See NAACP v. Button*, 371 U.S. at 434-36; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 462-63. In this case, the Men's Advisory Council sought, as part of its Complaint, an order preventing harrassment, inmate transfers, and other forms of retaliation due to the filing of the lawsuit. Complaint, p. 14, ¶ 5; ER. 14. The fear of retaliation – whether or not it is in fact justified – may dissuade inmates from pursuing their administrative and legal remedies. Litigation through an association can serve to vindicate some individuals' rights without exposing them to potential harm.

The First Amendment right of freedom to associate is not, however, absolute; it may be infringed "to serve

compelling [governmental] interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (citations omitted). There are no compelling governmental interests that justify denying indigent associations and corporations the right to proceed *in forma pauperis*. The State has attempted to articulate some policy concerns relating to the ability of organizations to litigate in federal court. These policy concerns are addressed in detail in part II of this Argument, below. None of these concerns is compelling and, certainly, none may justify an across-the-board denial of *in forma pauperis* status to all organizations in all circumstances.[23]

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[23] This Court's construction of § 1915(a) will determine whether *any* organization may ever seek *in forma pauperis* status in federal court. Of course, the organization in this case, the Men's Advisory Council, consists of inmates. But that fact should not influence the Court's construction of § 1915(a). Inmates' associational rights cannot be infringed absent a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The State's construction of § 1915(a) would violate the Council members' constitutional rights under even this test. There is no legitimate reason why the Council should receive less protection under the Constitution than other organizations. This is not a case, for example, like *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 127-28 (1977), where prison staff were concerned that formation of a labor union would increase friction between inmates and staff, and would lead to work stoppages and riots. In this case, the Warden himself created the Men's Advisory Council. The Warden wanted the inmates to have "representation" and "a voice." Complaint, p. 4, ¶ 7; ER. 4. Surely there can be no legitimate reason to still that voice merely because the Warden does not now like what he hears.

The State's construction of § 1915(a) thus raises serious questions of whether the statute impermissibly burdens First Amendment rights. This Court need not, however, resolve these difficult constitutional issues. There is no firm evidence that Congress intended § 1915(a) to burden in any way the ability of individuals to associate. To avoid these constitutional questions, and to protect the fundamental rights of association members, § 1915(a) must be construed to permit organizations to proceed *in forma pauperis*.

II. Policy Considerations Cannot Override The Unambiguous Language Of Section 1915(a).

As discussed above, the court of appeals correctly concluded that the unambiguous language of § 1915(a) allows associations to proceed *in forma pauperis*. The State claims, however, that because of "practical problems of administration," Petitioners' Brief on the Merits, p. 17, associations should be denied what the statute provides. The State's concerns are insubstantial. In any event, this argument is wrong as a matter of law. "Practical problems" do not and cannot justify ignoring unambiguous statutory language.

The State's primary policy argument is that it will be difficult for the federal courts to determine whether an association or other entity is truly indigent. *See* Petitioners' Brief on the Merits, pp. 17-18. But, contrary to the State's claim, federal courts are well-equipped to resolve the question of indigency. A person applying for permission to proceed *in forma pauperis* must submit a financial

affidavit. 28 U.S.C. § 1915(a).[24] Though the district court generally accepts the sworn allegations concerning the movant's financial status "at face value," the court has discretion to "inquire into such allegations and demand more specific information if necessary for a proper assessment of the movant's financial status." *Monti v. McKeon, D.D.S.*, 600 F. Supp. 112, 113 (D. Conn. 1984) (citation omitted), *aff'd mem.*, 788 F.2d 1 (2d Cir. 1985); *see also Williams v. Spencer*, 455 F. Supp. 205, 209 (D. Md. 1978), *aff'd on other grnds*, 622 F.2d 1200 (4th Cir. 1980). The courts of appeals and the Supreme Court may have an easier task of assessing indigency. By the time a case reaches these courts, a court below has likely already ruled upon a previous request for *in forma pauperis* status.[25] At all levels, courts have enormous discretion in

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[24] A false submission exposes the maker of the affidavit to the charge of perjury. "This constitutes a sanction important in protection of the public against a false or fraudulent invocation of the statute's benefits." *Adkins v. E. I. DuPont de Nemours & Co.*, 335 U.S. 331, 338 (1948). Furthermore, the court "may dismiss the case if the allegation of poverty is untrue. . . ." 28 U.S.C. § 1915(d). A judge may also assess costs, at the conclusion of the case, against a litigant who has improperly sought *in forma pauperis* status. *Adkins*, 335 U.S. at 338-39; 28 U.S.C. § 1915(e). Each of these mechanisms is as effective against an organization as it is against an individual.

[25] *See* Sup. Ct. R. 39.1 (motion in this Court shall state "whether or not leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted"); Fed. R. App. P. 24(a) (litigant that has proceeded *in forma pauperis* in district court may appeal *in forma pauperis* without further authorization, unless the district court certifies that the appeal is not in good faith or the party has the financial ability to pay litigation expenses).

ruling upon *in forma pauperis* motions and may even tailor a payment plan to a litigant's financial situation. *See, e.g., In re Epps*, 888 F.2d 964, 967 (2d Cir. 1989) (approving partial payment plan); *Bryan v. Johnson*, 821 F.2d 455, 457-58 (7th Cir. 1987) (same); *In re Williamson*, 786 F.2d 1336, 1338-41 (8th Cir. 1986) (same).

The courts may use their broad discretion to investigate whether an organization is truly indigent. In his dissent in *S.O.U.P.*, Judge Bazelon identified appropriate criteria to determine whether a non-natural entity may proceed *in forma pauperis*. Generally, the court should examine the nature of the lawsuit and the nature of the litigant. *S.O.U.P.*, 449 F.2d at 1144.

The first consideration is the nature of the lawsuit. Lawsuits raising issues affecting the public interest especially deserve the right to proceed *in forma pauperis*. *See, e.g., River Valley, Inc. v. Dubuque County*, 63 F.R.D. 123, 125 (N.D. Iowa 1974); *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 71 F.R.D. 93, 96 (S.D.N.Y. 1976); *S.O.U.P.*, 449 F.2d at 1143 (Bazelon, C.J., dissenting). Also, where (as here) an organization seeks declaratory or injunctive relief, rather than monetary damages, courts are more inclined to grant *in forma pauperis* status. *See, e.g., River Valley*, 63 F.R.D. at 123; *S.O.U.P.*, 449 F.2d at 1144 (Bazelon, C.J., dissenting); *see also FDM Manufacturing Co., Inc. v. Scottsdale Insurance Co.*, 855 F.2d 213 (5th Cir. 1988).[26]

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[26] The Fifth Circuit in *FDM* determined that a corporation could not file an appeal *in forma pauperis*. The court concluded

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The second consideration is the nature of the litigant. Public-interest, non-profit organizations have been regarded more favorably than profit-making corporations. *See, e.g., River Valley*, 63 F.R.D. at 125; *Harlem River*, 71 F.R.D. at 96; *S.O.U.P.*, 449 F.2d at 1143 (Bazelon, C.J., dissenting). Indigence, of course, is the primary concern. The courts are free to consider a wide range of facts, such as the assets and income of an organization, and the amount of fees facing the litigant. *Harlem River*, 71 F.R.D. at 95-6 (examining the organization); *Adkins*, 335 U.S. at 337 (noting that court may deny *in forma pauperis* motion if litigant unnecessarily increases the costs of litigation).

The State asserts that allowing organizations to proceed *in forma pauperis* would foster the "collusive evasion" of indigency requirements. Petitioners' Brief on the Merits, p. 19. The federal courts are well-equipped to ferret out any such "collusion," should it occur. The courts can ask litigants the appropriate questions to determine whether an *in forma pauperis* application has been filed in good faith.[27] Thus, despite the State's

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that a corporation is not a "person" within the meaning of § 1915(a). Although it did not explicitly address the issue in its opinion, the court may have been influenced by the fact that the corporation was seeking monetary damages. Furthermore, the Fifth Circuit found that the merits of the appeal were frivolous. *FDM*, 855 F.2d at 215.

[27] The courts have not been reticent to undertake this sort of inquiry and to deny *in forma pauperis* status when it appears that an organization is not proceeding in good faith. *See, e.g., Sears, Roebuck and Co. v. Charles W. Sears Real Estate, Inc.*, 686 F.

(Continued on following page)

alarms, it is a simple matter to determine whether an organization can litigate *in forma pauperis*.[28] The court, if necessary, may conduct a detailed inquiry into an organization and its finances. As the prior decisions demonstrate, federal courts are well-suited to this task.

The other policy concerns raised by the State are equally unavailing and may not, in any event, provide a basis to disregard the unambiguous language of a federal statute.

First, the State claims that allowing organizations to proceed under § 1915(a) will raise difficult questions of

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Supp. 385, 388 (N.D.N.Y.) (refusal to grant *in forma pauperis* status to a corporation wholly owned by one non-indigent individual), *aff'd*, 865 F.2d 22, 23 (2d Cir. 1988); *Honolulu Lumber Co. v. American Factors, Ltd.*, 265 F. Supp. 578, 581 (D. Hawaii 1966) (court was concerned that a large damage award might benefit a small number of stockholders, who may have had the assets to pay court costs); *Deuterium Corp. v. United States*, 21 Cl.Ct. 132, 136 (1990) (the party had already litigated for eight years with its own funds before seeking to proceed *in forma pauperis*).

[28] In this case, for example, the court of appeals found no need to investigate the finances of the Men's Advisory Council or its members. The Warden, one of the defendants in this case, made the Council unable to raise funds. Thus, the court of appeals ruled "not only is the [Council] indigent, but that state of affairs is clearly not due to any effort on the part of its members to obtain the benefits of litigation without bearing the ordinary financial burdens." *Men's Advisory Council*, slip op. at 9499. While the State criticizes the court of appeals for not promulgating some kind of universal "test" for indigency, Petitioners' Brief on the Merits, p. 17, the Ninth Circuit merely exercised appropriate judicial restraint. The court properly refrained from deciding matters that were not before it.

standing. Petitioners' Brief on the Merits, pp. 21-23. But standing has nothing to do with indigency. This Court has already articulated the appropriate tests to determine when an association has standing. In certain circumstances, an organization may sue on its own behalf. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). It may also have standing to sue on behalf of its members. *See New York State Club Association, Inc. v. City of New York*, 487 U.S. 1, 9 (1988); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975). For years, courts have applied the standing rules articulated in these cases. There is no reason why these rules are any more difficult to apply when an organization litigates *in forma pauperis* than when an organization prepays the court fees and costs.[29]

[29] The State also asserts that the Men's Advisory Council has no standing to bring this civil action. Because the district court denied the Council's *in forma pauperis* application, that court never addressed the issue of standing, and standing was not discussed by the court of appeals. Nevertheless, under the three-part test described in *Hunt*, the Council has standing. First, the Council alleged injury to inmates in the specific prison unit that the Council represents. Second, the Council was formed to further the welfare of all inmates in the unit; the lawsuit is germane to the organization's purpose. Third, the nature of the relief sought, the suit does not require the participation of individual inmates.

In arguing that the Council has no standing, the State misapplies the first prong of the *Hunt* test. The State contends that not all of the inmates could sue individually. Petitioners' Brief on the Merits, p. 22. There is, however, no requirement that *all* individuals be able to sue for an organization to have standing in a representative capacity. *See, e.g., UAW v. Brock*, 477 U.S. at 286 (first prong of *Hunt* test met because "at least some" UAW members would have had standing as individuals); *Warth*, 422 U.S. at 511 (the association must claim that its members, "or any one of them," are suffering injury).

Second, the State suggests that group claims should only be litigated as class actions, in part because voluntary associations have "an amorphousness inconsistent with efficient judicial administration." Petitioners' Brief on the Merits, p. 19. Once again, the State's argument addresses the wrong issue. The question in this case is whether *indigent* associations can be denied access to the courts, not whether associations *per se* should be deemed incapable of bringing a lawsuit. Associations may sue in federal court to enforce constitutional or statutory rights. *See* Fed. R. Civ. P. 17(b). In *UAW v. Brock*, 477 U.S. at 288-90, this Court squarely rejected the argument, repeated by the State here, that group claims must be resolved through class actions instead of through suits by organizations. Associations are already frequent federal litigants, and the courts recognize their unique contributions. Associations may bring to the case a reservoir of relevant expertise. *Id.* at 289. It may even be more effective to litigate claims through an association than through a class representative. *Id.* Thus, when people come together under a name and form that identifies collective interests, the only practical judicial policy " 'is to permit the association or corporation in a single case to vindicate the interests of all.' " *Id.* at 290 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)).

Third, the State asserts that corporations cannot appear *pro se*, and that allowing organizations to litigate *in forma pauperis* will increase the incidence of organizations litigating *pro se*. Petitioners' Brief on the Merits, pp. 20-21. This confuses two separate questions: who can appear in court and who can represent the parties that

appear in court. Even if, in certain circumstances, an entity cannot represent itself,[30] that is no reason to prevent an indigent entity from coming into court with other representation. An organization may be indigent and yet may still be represented by counsel. Courts and bar groups regularly call upon attorneys to provide *pro bono* representation to individuals and organizations.[31]

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[30] While there may be some general policy requiring corporations to appear through counsel in most circumstances, this policy is by no means absolute. *See, e.g., In re Victor Publishers, Inc.*, 545 F.2d 285 (1st Cir. 1976) (noting that the court, in a prior case, permitted a non-lawyer to represent a corporation); *United States v. Reeves*, 431 F.2d 1187 (9th Cir. 1970) (allowing a partner to appear on behalf of a partnership); *In the Matter of Holliday's Tax Services, Inc.*, 417 F. Supp. 182 (E.D.N.Y. 1976), *aff'd without opinion sub nom. Holliday's Tax Services, Inc. v. Hauptman*, 614 F.2d 1287 (2d Cir. 1979) (permitting an individual to represent a wholly owned corporation); *Matter of Sharon B.*, 72 N.Y.2d 394, 530 N.E.2d 832 (1988) (state law permits non-profit child welfare corporation to appear through officer).

[31] The American Bar Association ("ABA") has led the call for increased *pro bono* representation. Rule 6.1 of the ABA's Model Rules of Professional Conduct provides, in part: "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means *or to* public service or *charitable groups or organizations*. . . ." *Id.* (emphasis added); *see also Voluntarism: The ABA Spirit*, ABA Annual Report 1983-84 at 7, *reprinted in* 70 ABA Journal (Oct. 1984). Many district courts have adopted plans to assist *pro se* civil litigants to obtain volunteer counsel. *See ABA/BNA Lawyers' Manual On Professional Conduct* 91:6009-10 (1990) (listing districts with such plans).

Moreover, under 28 U.S.C. § 1915(d), a court may formally request counsel to represent a "person" on a *pro bono* basis. *Mallard v. United States District Court For The Southern District Of Iowa*, 490 U.S. 296, 301 (1989). Indeed, in this case, the court of appeals requested that present counsel represent the Men's Advisory Council *pro bono*, pursuant to § 1915(d). Hence, if a court is troubled because an organization has appeared *pro se*, surely the court can take some action more narrowly tailored to the perceived problem. Organizations should not be barred entirely from proceeding *in forma pauperis*.

Fourth, the State claims that the court of appeals decision will cause a radical increase in the number of district court filings and that few of these filings will be meritorious. Petitioners' Brief on the Merits, pp. 23-24. There is no indication, however, that allowing organizations to litigate without fees will result in a large increase in lawsuits. After all, the issue of organizations proceeding *in forma pauperis* reached the courts of appeals only a handful of times since 1959. Moreover, if organizations sue in a representative capacity, there may actually be a *decrease* in filings; one organizational lawsuit may replace many individual suits. Furthermore, the federal court is authorized to dismiss a case brought by an indigent litigant if the court is "satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d); *Denton v. Hernandez*, 60 U.S.L.W. 4346, 4347 (U.S. May 4, 1992); *Neitzke v. Williams*, 490 U.S. 319, 324 (1989); *see also* Sup. Ct. R. 39.8; *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 49 (1915). This measure, among others, "should be adequate to control any docket-management problems that might result from meritless prisoner claims." *Hudson v. McMillian*, ___ U.S. ___, 112 S.Ct. 995, 1004 (1992) (Blackmun, J., concurring);

see also Denton, 60 U.S.L.W. at 4347 (Congress passed § 1915(d) in response to the concern that indigents lack an economic incentive to refrain from filing frivolous lawsuits).

In *Neitzke v. Williams*, 490 U.S. 319 (1989), a case involving the meaning of the term "frivolous" in § 1915(d), this Court recently turned aside the very same arguments that the State presents here. The State of Indiana had urged that the term be construed broadly to "halt the 'flood of frivolous litigation' generated by prisoners. . . . " 490 U.S. at 325 (citation omitted). Justice Marshall, writing for a unanimous Court, rejected this policy argument: "We recognize the problems in judicial administration caused by the surfeit of meritless *in forma pauperis* complaints in the federal courts. . . . " *Id.* at 326 (citation omitted). However, "our role in appraising . . . [§ 1915] is not to make policy, but to interpret a statute." *Id.* Even if Indiana's proposal may be appealing as a way to prune meritless complaints from the federal courts, "as a matter of statutory construction it is untenable." *Id.*

The State's policy concerns are insubstantial. In any event, § 1915(a) is unambiguous. Thus, "as a matter of statutory construction" the State's policy arguments are "untenable." Policy concerns do not and cannot provide any reason to disregard Congress' statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

1 U.S.C. Section 1

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise –

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

28 U.S.C. Section 1915

§ 1915. Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses

shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

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No. 91-1188

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES ROWLAND, et al., Petitioners,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

PETITIONERS' REPLY BRIEF ON THE MERITS

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CALIFORNIA MEN'S COLONY, UNIT II MEN'S ADV. COUNCIL, Respondent.

PETITIONERS' REPLY BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

Petitioners[1], in answer to two new points raised by respondent, first deny that the relevant legislative history should be ignored by this Court on the basis of respondent's restrictive and inflexible formulation of the plain-meaning rule. Petitioners argue that the legislative history should be utilized in the same manner and fashion

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1. At various points in its brief, respondent refers to petitioners as "the State". E.g. Resp. Brf. on the Merits at 18, 20, 22-24, 31, 34-35, 37, 39-40. However, the State of California is not a party defendant in the original complaint (E.R. 1, 5-6), and in any case a state, its agencies, or its officials acting in their official capacities may not be sued under section 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 67, 71 (1989).

as every other court has used it, including the lower court in this case.

Secondly, respondent's argument that to deny associations in forma pauperis status would be unconstitutional is not before this Court, the issue having not been considered by the lower court or included in the grant of certiorari issued by this Court.

Finally, the legislative history shows nothing but silence on the part of Congress as to whether associations may proceed in forma pauperis. Respondent seeks to interpret this silence as positive intent on the associations issue. This offends common sense. The cluster of complex and unsolved issues which arise from the adoption of respondent's interpretation and remain unsolved also shows that not a moment's time was spent by Congress on the subject. The absence of any provision for the numerous procedural problems, including the test of indigency for an association, indicates a lack of intent to deal with the subject at all. In any case, the assumption of an omniscient Congress is particularly unwarranted under the facts of this case and the anomalous decision of the lower court must be reversed.

ARGUMENT

I. THIS COURT IS NOT RESTRICTED TO CONSIDERATION OF THE WORDS OF THE RELEVANT STATUTES AND MAY CONSIDER LEGISLATIVE HISTORY IN DETERMINING WHETHER AN ASSOCIATION MAY PROCEED IN FORMA PAUPERIS

Respondent, while conceding that there is relevant legislative history, argues that this Court should not consider it. Rather, respondent asks that this Court reach a decision based only the words of the relevant statutes. There are both legal and practical reasons for ignoring such a harsh exclusionary rule. Resp. Brf. on the Merits at 18-19.

There is no authority which would absolutely bar consideration of the legislative history. Even the most basic general principles of statutory construction must yield to clear contrary evidence of statutory intent. Nat. Railroad Passenger Corp. v. Nat. Assn. of Railroad Passengers, 414 U.S. 453, 458 (1974). When aid to construction of the meaning of words is available, there can be no rule of law which forbids its use, however clear the words may appear on superficial examination. Cass v. U.S., 417 U.S. 72, 78-79 (1974). As stated in Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 454-455 (1989):

Even though, as Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Cabell v. Markham, 148 F.2d 737, 739 (CA2), *aff'd*, 326 U.S. 404 (1945). Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." Boston Sand & Gravel Co. v. [U.S.], 278 U.S. 41, 48 (1928) (Holmes, J.).

The plain-meaning rule "does not require a court to operate under an artificially induced sense of amnesia about the purpose of legislation, or to turn a blind eye towards significant evidence of Congressional intent in the legislative history." Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 871 (9th Cir. 1981). It simply makes no sense to pretend there is no legislative history pertinent to this case. Every lower court which has discussed the issue has considered the legislative history

and has opined in light of that history. FDM Mfg. Co. v. Scottsdale Insurance Company, 855 F.2d 213, 214 (5th Cir. 1988); SOUP Inc. v. FTC, 449 F.2d 1142, 1143 (D.C. Cir. 1971); Sears Roebuck & Co. v. C.W. Sears Real Estate, 686 F.Supp. 385, 388 (N.D. N.Y. 1988), *aff'd*, 865 F.2d 22, 23 (2d Cir. 1988); MOVE Organization v. U.S. Dept. of Justice, 555 F.Supp. 684, 691 (E.D. Penn. 1983); Harlem River Consumers Coop. v. Associated Grocers, 71 F.R.D. 93, 96 (S.D. N.Y. 1976); River Valley, Inc. v. Dubuque County, 63 F.R.D. 123, 124 (N.D. Iowa 1974); Honolulu Lumber Co. v. American Factors Ltd., 265 F.Supp. 578, 580 (D. Hawaii 1966), *aff'd. on other grounds*, 403 F.2d 49 (9th Cir. 1968).[2/]

Indeed, the lower court in this case found it necessary to review the legislative history despite its ultimate holding that the language of the statute was intended to permit associations to proceed in forma pauperis. CMC Unit II, Men's Adv. Council v. Rowland, 939 F.2d 854, 856, 858 (9th Cir. 1991) [hereinafter "CMC"]; compare Sears Roebuck & Co. v. C.W. Sears Real Estate, 686 F.Supp. 385, 388 (N.D. N.Y. 1988), *aff'd*. 865 F.2d 22, 23 (2d Cir. 1988) [section 1915(a) not

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2. Atlantic S.S. Corp. v. Kelley, 79 F.2d 339 (5th Cir. 1935) and Quittner v. Motion Picture Producers & Distributors of America, Inc., 70 F.2d 331 (2d Cir. 1934) were issued before the 1959 amendment to section 1915(a) and therefore contain no discussion of the legislative history of that amendment.

unambiguous on its face and therefore the court must seek guidance from the legislative history]. The legislative history, being in the record and clearly the focus of any serious discussion of the issue at hand, should inform the decision of this Court in the manner outlined in Petitioners' Brief on the Merits at 11-17 and Argument III, *infra*.

II. RESPONDENT CANNOT NOW RAISE THE ISSUE OF WHETHER THERE IS A CONSTITUTIONAL ASPECT TO THE DENIAL OF IN FORMA PAUPERIS STATUS TO ASSOCIATIONS, THAT ISSUE NOT HAVING BEEN DECIDED BY THE LOWER COURT OR INCLUDED IN THE GRANT OF CERTIORARI ISSUED BY THIS COURT

Whether associations have a constitutional right to proceed in forma pauperis was raised by respondent[3/] in the lower court but, as it concedes, this claim was not considered by the lower court. Resp. Brf. on the Merits at 25, n. 21; CMC at 859. Therefore, this issue should not be considered now. Yee v. City of Escondido, 503 U.S. ___, 112 S.Ct. 1522, 1531 (1992); Youakim v. Miller, 425 U.S. 231, 234 (1976). Moreover, the issue was not included as one of the issues to be determined in the grant of certiorari. Consequently, under Rule 14.1(a) of this Court's rules, this issue should not be considered by this Court. See Yee v. City of Escondido, 112 S.Ct. at 1532-1533; e.g., Beck v. Washington, 369 U.S. 541, 554 (1962).

3. Petitioners answered these arguments in the lower court. Appellees' Brief, No. 90-55600, at 8-9.

III. RESPONDENT HAS NOT DEMONSTRATED THAT SECTION 1915(A), READ WITHIN THE CONTEXT OF THE RELEVANT LEGISLATIVE HISTORY, CAN FAIRLY BE INTERPRETED TO MEAN THAT CONGRESS INTENDED ASSOCIATIONS TO PROCEED IN FORMA PAUPERIS

This case is beset by respondent's assertions of artificial conventions, maxims, and strictures. For example, contrary to common sense, respondent asks this Court to completely ignore all legislative history on the basis of a very restricted formulation of the plain meaning rule.[4/] See Argument I, *supra*. The same artificiality

4. Another example is respondent's attack on the Atlantic S.S. Corp. case. See n. 1, *supra*. Both Quittner and Atlantic S.S. Corp. are cases from the 1930's which stand for the proposition that prior to the 1959 amendment, corporations could not proceed in forma pauperis. Respondent now tells us that Atlantic S.S. Corp., a 57-year old case, was wrongly decided because a 1809 case upon which Quittner supposedly turns was reversed in 1844. Resp. Brf. on the Merits at 21-22.

The true story is set forth in Navarro Savings Assn. v. Lee, 446 U.S. 458, 461, n. 7 (1980) and may be summarized as follows: Bank of U.S. v. Deveaux, 5 Cranch 61, 86-87, 91 (1809), *overruled*, Louisville, C., & C.R. Co. v. Letson, 2 How. 497 (1844), *resurrected*, Marshall v. Baltimore & Ohio R. Co., 16 How. 314 (1854), *obviated*, 28 U.S.C. section 1332(c)(1). In any case, the exclusive

informs respondent's argument regarding the meaning of the legislative history.

Respondent argues that the legislative history demonstrates that Congress wished to include associations within the meaning of "person" in section 1915(a) because Congress must be assumed to have considered all aspects of the statutory modification it was then contemplating. Resp. Brf. at 13-14, 22. On the other hand, petitioners note that the absence of any shred of evidence regarding Congress's consideration of this point, let alone its intent, hardly constitutes evidence in respondent's favor. See Ngiraingas v. Sanchez, 495 U.S. 182, 187, 189 (1990). It seems anomalous to predicate intent on the basis of precisely the silence which would indicate a lack of intent to most reasonable readers of the legislative history.

Courts are not free to fashion policy in Congress' name when Congress has been silent. "Ordinarily, 'Congress' silence is just that -- silence.'" Community for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989).

subject of these cases is the citizenship of a corporation, if any, for diversity purposes and the reference to Deveaux is hardly crucial to the holding in Atlantic S.S. Corp.

Respondent's rarefied academic discussion is of no consequence. Atlantic S.S. Corp. is now mainly of historical importance to show that all courts of appeal, both prior to and after the 1959 amendment, have held that corporations may not litigate in forma pauperis with the exception of the Ninth Circuit in the instant case.

legislative . . . silence." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980). As Justice Stevens has stated: "The Court is sometimes skeptical about the meaning of a statute that appears to make a major change in the law when the legislative history reveals a deafening silence about any such intention." Stevens, The Shakespeare Canon of Statutory Construction, 140 U. Pa. L. Rev. 1373, 1382 (1992).

Moreover, respondent postulates an idealized Congress which must have considered all implications of the amendment in question. This omniscient Congress would surely have foreseen the numerous practical problems of administration pointed out earlier by petitioner and provided a remedy for them. Pet. Brief on the Merits at 17. It clearly did not.[5/] Any recognition or

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5. Respondent seeks to minimize these problems, but a fair reading of petitioners' discussion of these problems would indicate they are so myriad and diverse that an omniscient Congress could not possibly have intended to leave these problems without solution.

Respondent assures us there is no problem in assessing the indigency of the association or its individual members, assuming that our courts will eventually agree as to whose indigency must be assessed, the association, its members, or both, and how those assets are to be reported and verified. Resp. Brf. on the Merits at 32-33. He entrusts the determination of these procedural matters to the courts and discounts the chaos which will prevail among the circuits before a single formula is agreed upon. However, the affidavit of poverty submitted in the instant case illustrates that matters are not that simple. The

parties are unable to agree whether the individual filing the affidavit is speaking of his own resources or that of the organization he belongs to. E.R. 43-44; compare Resp. Brf. on the Merits at 3, n. 3; Pets. Brf. on the Merits at 6. This problem is the natural result of the confusion between organization and individual which is the hallmark of the procedural issues engendered by CMC.

Respondent continually seeks to slough off the issue of indigency determination. Yet the essence of in forma pauperis is that only the poor should be served by the statute and the definition of whom the poor are is the key to the benefits of section 1915. The problem is essentially that of piercing the corporate veil.

> In addition to [the] legislative history, another consideration weighs against permitting corporations to reap the benefits of section 1915. If corporations were allowed to proceed in forma pauperis, there would exist the prospect that stockholders . . . might try to hide behind a corporate veil in order to avoid the costs of litigation.. This danger was touched upon in MOVE Organization, 555 F.Supp. at 691, and Honolulu Lumber, 265 F.Supp. at 581. That such a scenario would arise is so obvious that it is doubtful that Congress would not have provided some guidance to the courts concerning how deeply they should look behind the corporate structure to determine indigence
>
> if it truly intended corporations to reap the benefits of the statute.

Sears Roebuck & Co. v. CW Sears Real Estate, 686 F.Supp. at 388; see Appellees' Brief, No. 90-55600, at 5-7.

Respondent is equally sanguine about all aspects of the procedural problems raised by petitioners. It assures us that because pro bono representation is recommended by the American Bar Association, counsel will be available for litigating organizations. Resp. Brf. on the Merits at 38, n. 31. The experience of trial courts, even in an age when there is a glut of lawyers, is to the contrary.

Respondent tells us that there will be no explosion of cases, based solely on the fact that only a handful of organizations have applied for in forma pauperis status since 1959. Resp. Brf. on the Merits at 39-40. It ignores the fact that all circuit court precedent since 1959, with the exception of the instant lower court opinion, held that such actions could not be maintained.

As to the numbers of association cases to be anticipated, respondent suggests that dishonest suits be deemed frivolous under section 1915(d) but offers no reason why this provision would deal with the situation where the causes of action are meritorious but are presented by an organization of uncertain origin, assets, and aims. Resp. Brf. on the Merits at 40. It suggests that a decrease in filings might result if one organizational suit replaced several individual ones. Id. This is a tacit acknowledgement of one area of abuse, the evasion of class action requirements through the use of an organization plaintiff. Finally, as stated in Petitioners' Brief on the Merits at 19, 22, there are significant standing and discovery issues raised by the lower court decision.

appreciation of these problems is absent from the legislative history and amended statute.

The presumption of an omniscient Congress is particularly ludicrous under the circumstances in this case. Indeed, this case reinforces another model of Congress, one that is less than all-knowing, susceptible at least to sins of omission, and capable of acting with "sheer inadvertence". Cass v. U.S., 417 U.S. at 83. This Congress might well have been so narrowly focused on the issue of aliens being denied in forma pauperis status that it did not consider whether the modification from "citizen" to "person" would also affect associations. This model has the advantage of squaring with the real world.

Congress meant only one thing when it amended the statute. That intent was to extend the benefits of section 1915(a) to resident aliens.

> This legislative history is convincing. We would be impermissibly reading more into the statute than Congress intended if we were to hold that the 1959 amendment added corporations as well as aliens to the list of those entitled to seek [in forma pauperis] status.

FDM Mfg. Company v. Scottsdale Ins. Co., 855 F.2d at 214. The Ninth Circuit's extension of section 1915(a) on the basis of this single-minded legislative history is simply building policy upon a fiction or pretext. Our courts are not committed to decision by maxim or presumption and such an inflexible approach must be eschewed.

CONCLUSION

Respondent's brief on the merits provides no basis for upholding the erroneous opinion of the lower court and therefore, this Court should reverse the holding of the Ninth Circuit.

DATED: June 8, 1992

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STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On June 10, 1992, I served the attached **PETITIONER'S REPLY BRIEF ON THE MERITS** in Rowland, et al. v. California Men's Colony, Unit II Men's Advisory Counsel, No. 91-1188, by placing a true copy thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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Cynthia L. Bain
AFFIANT

Subscribed and sworn to before me this 10th day of June, 1992.

Lucinda Seaton
Notary Public in and for said County and State

LUCINDA SEATON
NOTARY PUBLIC - CALIFORNIA
County of Sacramento
My Commission Expires 2/3/95

COPY

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No. 91-1188

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES ROWLAND, et al., Petitioners,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Respondent served its supplemental brief on August 4, 1992. Respondent therein advanced the argument that Patterson v. Shumate, __ U.S.__, 112 S.Ct. 2242 (1992) is recent authority relevant to the determination of this case.

ARGUMENT

I. PATTERSON AND OTHER STATUTORY INTERPRETATION CASES FROM LAST TERM HOLD THAT EVEN WHERE THE LANGUAGE OF A STATUTE IS PURPORTEDLY PLAIN, PRUDENCE DICTATES THAT RELEVANT LEGISLATIVE HISTORY BE EXAMINED

Respondent cites Patterson in support of its position. However, it must be noted that respondent now appears to be arguing, in light of Patterson, that relevant legislative history must be taken into account even if the thrust of the argument is the "plain meaning" of the statute.

Patterson presented the following question: Does an anti-alienation provision contained in an ERISA-qualified pension plan constitute a restriction on transfer enforceable under applicable nonbankruptcy law (11 U.S.C. section 541(c)(2)) such that the debtor's interest in the plan was properly excluded from the property of the bankruptcy estate? Patterson, 112 S.Ct. at 2245.

This Court found that nothing in the plain language of the statute or in the legislative history showed an intent to limit the term "applicable nonbankruptcy law" to state law. Indeed, Congress had restricted applicable law to state law several times in the Bankruptcy Code and had not explicitly restricted section 541(c)(2) in a similar manner. Patterson, 112 S.Ct. at 2246. This interpretation of the statute, combined with this Court's holding that the pension interest was properly within the ERISA exclusion (Patterson, 112 S.Ct. at 2247-8), compelled the conclusion that the interest was still the debtor's.

Patterson states, and will be cited in the future, for the bald proposition that clear statutory language creates no ambiguity, and that only ambiguity will lead to resort to legislative history. Id. at 2248. However, this statement is immediately followed in the text of the opinion with a discussion of the legislative history. Indeed, this Court used the legislative history to bolster its interpretation of the supposedly "clear" statutory language. Id. This Court found a surplusage argument without merit, a discussion not relevant to the issues presented in this case. Finally, this Court considered and rejected an argument that the Court's interpretation was contrary to the Bankruptcy Code's policy of including all assets in the bankruptcy estate. Patterson, 112 S.Ct. at 2249. The briefest review of the case shows that Patterson is not a "plain meaning" case but rather one in which all information relevant to meaning was considered. Because all analyses of the statute and its context were consistent, no member of the Court dissented.

Justice Scalia, in concurring with the result, noted that the result was consonant with "a neutral and rational interpretive methodology" involving consideration of the entire Bankruptcy Code. Patterson, 112 S.Ct. at 2251. In fact, consideration of the entire context of the provision in question, rather than the "one-subsection-at-a-time approach", is the key for his call for a return to the "normal and obvious" and "attention to text", and for an "agreed-upon methodology for . . . interpreting text". Patterson, 112 S.Ct. at 2250.

Patterson, then, stands for reasoned consideration of the entire context of a statute as well as legislative history. The case ultimately holds that self-imposed ignorance is not the guiding rule of statutory interpretation. As Justice Souter reiterated in U.S. v. Thompson/Center Arms Co., 112 S.Ct. 2102, 2109, n.8 (1992), quoting Justice Frankfurter in U.S. v. Monia, 317 U.S. 424, 432 (1943) [dissent]:

> [T]he statute. . .is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners.

In resolving INS v. National Center for Immigrants' Rights, _ U.S._, 112 S.Ct. 551, 557-558 (1991) the Court quoted Justice Frankfurter in U.S. v. Witkovich, 353 U.S. 194, 199 (1957):

> [O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content

> to the words become operative. A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, by the persuasive gloss of legislative history or by the rule of constitutional adjudication . . .

Clarity of meaning is of course a subjective conclusion. But how clear any given language is may be partially determined by any lack of contrary information, whether that information is legislative history, a similar phrasing in other statutes, or other comparative data. A prudent court, however clear the language in question might be, would certainly consider any hint of dissonance from these sources. Not the least of these sources is the policy of the legislation of which the provision in question is a part. As the dissenters stated in Cipollone v. Liggett Group, __ U.S. __, 112 S.Ct. 2608, 2632 (1992):

> The ultimate question in each case . . . is one of Congress'[] intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved.

A statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context. King v. St. Vincent's Hosp., _ U.S._, 112 S.Ct. 570, 574 (1991). Ultimately, the "agreed-upon methodology" desired by Justice Scalia may be no more than the cardinal lawyer's rule that nothing relevant should be ignored.

Due to the page limitations for supplemental briefs (Supreme Court Rule 33.3), substantial examination of all statutory construction cases during the last term cannot be

made here. However, Table One, set forth in the appendix, indicates whether either plain meaning or legislative history or context was considered, and which doctrine was utilized by the majority, concurring, plurality, and minority opinions.

Table One shows there is no case where legislative history or other ancillary sources are not consulted whether or not the meaning of the statute is deemed plain. Indeed, the plurality opinion in U.S. v. R.L.C., _ U.S._, 117 L.Ed.2d 559, 568 (1992), Part II-B, is the only opinion in the group which recites the classic "plain meaning" rule that no resort to legislative history should be made if the language is clear. A discussion of the legislative history immediately followed this language in Part II-C. Obviously, the same prudential rule followed in the other cases informed R.L.C.

II. EXAMINATION OF SIMILAR STATUTORY INTERPRETATION CASES FROM LAST TERM INDICATES THAT THE LEGISLATIVE SILENCE IN THE INSTANT CASE CANNOT COMPRISE POSITIVE LEGISLATIVE INTENT TO AWARD ASSOCIATIONS AND CORPORATIONS IN FORMA PAUPERIS STATUS

Last Term's cases illustrate that reference to legislative history is made as a matter of course by a majority of the Court even when a "plain meaning" is interposed. A review of selected cases from last term also shows that respondent's substantive arguments are meritless.

Patterson, as noted above, seems to be a "plain meaning" case favorable to respondent because it rejects another interpretation based on legislative history. However, this analysis reflects Justice Scalia's dissent, not the majority's reasoning. The majority found "applicable nonbankruptcy law" to include both federal and state law in part because this interpretation "comports with other references in the Bankruptcy Code to sources of law." Patterson, 112 S.Ct. at 2246.

> The Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope of applicable law to "state law" and did so with some frequency. . . . Congress' decision to use the broader phrase, "applicable nonbankruptcy law" . . . strongly suggests that it did not intend to restrict the provision in the manner that petitioner contends.

Id. at 2246-2247. Thus, although the phrase in question may have been "plain" in not being "self-restrictive" en soi, there was adequate corroborating evidence of Congress' intent in parallel structures throughout the Bankruptcy Code. No such corroborating features guided the Ninth Circuit in deciding the instant case.

Union Bank v. Wolas, __ U.S.__, 112 S.Ct. 527, 528 (1991) is similar to Patterson in that its "plain meaning" language may be oversold. Once again, Justice Scalia's dissent states the "plain meaning" rule in its purest form. Justice Scalia noted that in the absence of a scrivener's error producing an absurd result, the language clearly did

not distinguish between long- and short- term debt, the litigation was unnecessary and unmaintainable. Union Bank, 112 S.Ct. at 534; compare U.S. v. R.L.C., 117 L.Ed.2d 559, 577-578 [O'Connor, J., dissenting] (court cannot infer major change in juvenile sentencing by mere deletion in technical bill).

Union Bank examined the question of whether payments on long-term debt by a bankrupt business are transfers in the ordinary course of business such that the trustee cannot recover them. The majority held that both long-term and short-term debt may qualify for the exception but left undetermined the predicate situation, whether the loans were in the ordinary course of business. Id. at 533-534.

As in the instant case, Union Bank involved a subsequent amendment of the statute for which there was undisputed legislative history. The statute was amended in pertinent part to provide that the ordinary course of business exception did not apply unless the payment was made within 45 days of the date the debt was incurred. Later, the 45-limitation was deleted. The nub of the problem was whether, in the absence of any positive statement by Congress, these amendments reflected a changing attitude towards protection of long-term, as opposed to short-term, debtors. Union Bank, 112 S.Ct. at 530-531. This Court noted that the fact that Congress may not have foreseen all the consequences of a statutory enactment may not be a sufficient reason for refusing to give effect to plain meaning. Having exhausted the statutory history of the provision, the Court noted that the

recovery provision and exception were not codifications of the pre-Bankruptcy Act exception for trade vendors. Id. at 531-532. Finally, this Court noted it could not say that Congress had not attempted to satisfy the dual purposes of the Bankruptcy Act, equal distribution and preventing a race to the courthouse to seize debtor assets, when it deleted the 45-day limitation. Id. at 533.

It must be noted that the deletion in Union Bank is more meaningful that the change from "citizen" to "person" in the instant case. In Union Bank, Congress added a limitation and then repealed it by directly amending the same provision. "[E]ven if Congress [repealed the limitation] to redress particular problems of short-term creditors, it remains true that Congress redressed those problems by entirely deleting the time limitation . . ." Union Bank, 112 S.Ct. at 531. Surely, a reversal of policy is implied by subsequent deletion of the provision enacting the policy in the first place. Nothing so positive may be drawn from the instant case, as a mere substitution of "person" for "citizen", in light of the relevant legislative history, was narrowly intended to convey the benefits of in forma pauperis status to resident aliens.

CONCLUSION

If Patterson is considered relevant, attention must be paid to the other statutory interpretation cases issued last term. Unfortunately, consideration of these cases yields no consistent rule, but rather, a rule of combination of rules. It is untoward to suggest that an element of intuitive guidance informs the decisions in these cases.

However, it is clear that this Court, in deciding these rather arcane matters of legislation, does in fact function as an interstitial and coordinate legislative body in those marginal areas where the statute's imperfections are self-evident.

DATED: August 31, 1992

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APPENDIX

TABLE ONE

Supreme Court Cases from the October 1991 Term Dealing with Statutory Interpretation

This table lists Supreme Court cases from the October 1991 term which dealt with the interpretation of statutes or regulations. Majority, plurality, concurring and minority opinions which utilize a pure plain meaning approach or which deal with legislative history or context are noted with the appropriate page citation. The justices adhering to the opinions and a short quotation from the opinion are set forth in the footnotes.

For example, the majority opinion in Ardestani at page 520 states: "In this case, the legislative history cannot overcome the strong presumption 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" Therefore, although Ardestani will be cited as a "plain meaning" case in the future, this Court considered legislative history in deciding the issue and the majority opinion is listed under "Legislative his./context" in the table. The Ardestani dissent is listed under this heading because it is based on consideration of the legislative history rejected by the majority. Therefore, a listing under the "Legislative his./context" encompasses any case where the Court considered legislative history or context, whether or not that history or context proved determinative of the result.

Case	Plain meaning	Legislative his./context
Ardestani v. INS 112 S.Ct. 515		Maj., 520[1] Min., 522[2]
Union Bank v. Wolas 112 S.Ct. 527 (1991)	Con., 534[3]	Maj., 531[4]
INS v. Nat. Cen. for Imm. Rights 112 S.Ct. 551 (1991)		Maj., 558[5]
King v. St. Vincent's Hosp. 112 S.Ct. 570 (1991)		Maj., 574[6]
INS v. Elias-Zacarias 112 S.Ct. 812 (1992)	Maj., 816[7]	Min., 818[8]
Presley v. Etowah Co. Comm. 112 S.Ct. 820 (1992)		Maj., 829[9] Min., 837[10]
U.S. v. R.L.S. 117 L.Ed.2d 559 (1992)	Con., 573[11] Con., 576[12]	Plu., 568[13] Dis., 577[14]
Nationwide Mut. Ins. Co. v. Darden 117 L.Ed.2d 581 (1992)		Maj., 590[15]

Case	Plain meaning	Legislative his./context
U.S. v. Alaska 112 S.Ct. 1606 (1992)		Maj., 1611[16]
U.S. Dept. of Energy v. Ohio 112 S.Ct. 1627 (1992)		Maj., 1635[17] Con./Dis. 1641[18]
U.S. v. Burke 112 S.Ct. 1867 (1992)	Con., 1875[19]	Maj., 1870[20] Con., 1877[21] Dis., 1879[22]
U.S. v. Thompson /Contender Arms Co. 112 S.Ct. 2102 (1992)	Con., 2111[23] Dis., 2113[24] Dis., 2114[25]	Plu., 2108[26]
Patterson v. Shumate 112 S.Ct. 2242 (1992)	Con., 2250[27]	Maj., 2248[28]

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[1] O'Connor, Rehnquist, White, Scalia, Kennedy, Souter.

"In this case, the legislative history cannot overcome the strong presumption 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"

"We are unable to identify any conclusive statement in the legislative history regarding Congress' decision to define adversary adjudications . . ., much less one that would undermine the ordinary understanding of the phrase 'under section 554'."

[2] Blackmun, Stevens.

"The Court's opinion is all the more troubling . . . because it suggests that the Court has forgotten its recent admonition that the EAJA must be construed 'in light of its purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action.'"

[3] Scalia.

"Since there was here no contention of a 'scrivener's error' producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable."

[4] Stevens for a unanimous Court.

"We need not dispute the accuracy of respondent's description of the legislative history of the 1984 amendment in order to reject his conclusion."

[5] Stevens for a unanimous Court.

"The contested regulation is wholly consistent with this established concern of immigration law and thus squarely within the scope of the Attorney General's statutory authority."

[6] Souter for all members except Thomas, who did not participate.

"[W]e do nothing more . . . than follow the cardinal rule that a statute is to be read as a whole, . . . since the meaning of the statutory language, plain or not, depends on context."

[7] Scalia, Rehnquist, White, Kennedy, Souter, Thomas.

"In construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."

[8] Stevens, Blackmun, O'Connor.

"The narrow, grudging construction of the concept of 'political opinion' that the Court adopts today is inconsistent with the basic approach to this statute endorsed in [citation utilizing 'plain language, . . . United Nations Protocol, and . . . legislative history. . .']."

[9] Kennedy, Rehnquist, O'Connor, Scalia, Souter, Thomas.

"Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision."

[10] Stevens, White, Blackmun.

"The reenactment of section 5 . . . reflected congressional approval of Allen's broad interpretation of the Act."

[11] Scalia.

"[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history."

[12] Thomas.

"I agree with Justice Scalia that the use of legislative history to construe an otherwise ambiguous penal statute is difficult to reconcile with the rule of lenity."

[13] Souter, Rehnquist, White, Stevens, Scalia, Kennedy, Thomas, as to Parts I, II-A, III. Souter, Rehnquist, White, Stevens, as to Parts II-B, II-C. The following excerpt is from Part II-A, in which the majority turns to statutory construction after finding the words ambiguous. This is consistent with classic plain meaning doctrine.

"[W]e turn to examine the textual evolution of the limitation in question and the legislative history that may

explain or elucidate it."

[14] O'Connor, Blackmun.

"By failing to interpet [the statute] in light of the statutory scheme of which it is a part, the Court interprets a 'technical amendment' to make sweeping changes to the process and focus of juvenile sentencing."

[15] Souter for a unanimous Court.

"[A]fter each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning."

[16] White for a unanimous Court.

"The statutory antecedents of this provision similarly offer little insight into Congress' intent."

[17] Souter for a unanimous Court with respect to Part II-C. Souter, Rehnquist, O'Connor, Scalia, Kennedy, Thomas with respect to the remainder of Souter's opinion. The following excerpt is from Part II-A.

"What we find elsewhere in each statute are various provisions specially defining "person" and doing so expressly for purposes of the entire section in which the term occurs."

[18] White, Blackmun, Stevens, concurring and dissenting.

"It is axiomatic that a statute should be read as a whole."

[19] Scalia.

"[T]here is no basis for accepting, without qualification, the IRS' 'tort rights' formulation, since it is not within the range of reasonable interpretation of the statutory text."

[20] Blackmun, Rehnquist, White, Stevens, Kennedy.

"Neither the text nor the legislative history of section

104(a)(2) offers any explanation of the term 'personal injuries.'"

[21] Souter.

"Our cases have. . . recognized parallels (although for different purposes) between tort claims and claims under anti-discrimination statutes other than Title VII."

[22] O'Connor, Thomas.

"The purposes and operation of Title VII are closely analogous to those of tort law, and that similarity should determine excludability of recoveries for personal injury under . . . section 104(a)(2)."

[23] Scalia, Thomas.

"The plurality reaches its textually uncharted destination by determining that the statutory definition of 'make,' the derivative of which appears as an operative word in . . . section 5821 . . . , covers the making of parts that, assembled, are firearms."

[24] White, Blackmun, Stevens, Kennedy.

"I agree with the majority that this pinched interpretation of the statute would fail to accord the term 'make' its full meaning as that term is defined, section 5845(i), and used in the definition of the term 'rifle', section 5845(c)."

[25] Stevens.

"I agree with Justice White . . . and also with the Court . . . that respondent has made a firearm even though it has not assembled its constituent parts."

[26] Souter, Rehnquist, O'Connor.

"While such a conclusion of redundancy could suggest that Congress assumed that 'make' in the NFA did not cover unassembled parts, the suggestion (and the implied conflict with out reading of 'make') is proven false by

evidence that Congress actually understood redundancy to result from its new silencer definition."

[27] Scalia.

"When the phrase 'applicable nonbankruptcy law' is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for 'state law' is mystifying."

[28] Blackmun for a unanimous Court.

"Even were we to consider the legislative materials to which petitioner refers, . . . we could discern no 'clearly expressed legislative intention' contrary to the result reached above."

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On September 4, 1992, I served the attached **PETITIONER'S SUPPLEMENTAL BRIEF** in Rowland, et al. v. California Men's Colony, Unit II Men's Advisory Counsel, No. 91-1188, by placing a true copy thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

CHARLES D. WEISSELBERG
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U.S.C. Law Center
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Cynthia Bain
AFFIANT

Subscribed and sworn to before
me this 4th day of September, 1992.

Rosalind D. Lender
Notary Public in and for said
County and State

ROSALIND LENDER
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SACRAMENTO
My Comm. Exp. March 14, 1993

Supreme Court, U.S.
FILED
OCT 5 1992
OFFICE OF THE CLERK

No. 91-1188

In The

Supreme Court of the United States

October Term, 1992

JAMES ROWLAND, et al.,

Petitioners,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADVISORY COUNCIL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

THIS COURT SHOULD CONSTRUE 28 U.S.C. § 1915(a) IN THE SAME MANNER AS THE STATUTE IN *PATTERSON V. SHUMATE*

As explained in the Brief for Respondent, the unambigous language of 28 U.S.C. § 1915(a) permits associations to proceed *in forma pauperis*. This Court may not find, in the silent legislative history to § 1915(a), any evidence contrary to the plain language of § 1915(a). In *Patterson v. Shumate*, ___ U.S. ___, 112 S.Ct. 2242 (1992), decided after the Brief for Respondent was filed, this court interpreted a provision of the Bankruptcy Code. This Court followed the plain language of the statute and refused to find, from a silent legislative history, evidence of a clear legislative intention contrary to the plain language of the Bankruptcy Code. This court should construe § 1915(a) in the same manner as the statute at issue in *Patterson*.

The question in *Patterson* was whether a debtor could exclude certain property from a bankruptcy estate. A provision of the Bankruptcy Code, 11 U.S.C. § 541(c)(2), provides that a debtor could exclude from the estate any interest in a trust that was subject to a transfer restriction enforceable under "applicable nonbankruptcy law." The debtor in *Patterson* had an interest in a pension plan that contained an anti-alienation provision required by ERISA. The issue was whether ERISA was an "applicable nonbankruptcy law" or whether, as the petitioner contended, the phrase was limited exclusively to nonbankruptcy *state* law.

The Court rejected the petitioner's narrow reading of the statute. As the Court held, "[t]he text contains no limitation on 'applicable nonbankruptcy law' relating to the source of law." *Patterson*, 112 S.Ct. at 2246. "Plainly read," the statute encompasses federal law such as ERISA, and "[w]e must enforce the statute according to its terms." *Id.* at 2247 (citation omitted).

The petitioner in *Patterson* also argued that the legislative history to § 541(c)(2) demonstrated Congress' intent to limit that statute only to pension plans that qualified under state law as spendthrift trusts. The Court rejected this argument, noting that the clarity of the statutory language obviated the need to examine the legislative history. *Id.* at 2248. Moreover, even were the Court to examine the legislative history, that history did not reveal any clear legislative intention contrary to the plain language of the statute. *Id.* The legislative history referred to state law, but did not mention ERISA. It thus reflected, at best, a congressional intention to include state law within the meaning of "applicable nonbankruptcy law." The history did not give "a sufficient basis for concluding, in derogation of the statute's clear language, that Congress intended to *exclude* other state and federal law from the provision's scope." *Id.* (emphasis in original).

Patterson should assist this Court in construing 28 U.S.C. § 1915(a). Section 1915(a) says that a "person" may proceed *in forma pauperis* and 1 U.S.C. § 1 expressly states that the word "person" includes associations. *Patterson* makes clear that a statute should not be limited in a manner that is contrary to its plain meaning.

Patterson also provides particular guidance in disposing of the petitioners' legislative history claims. In *Patterson*, the legislative history referred to state spendthrift trusts but the history neither mentioned ERISA nor indicated that "applicable nonbankruptcy law" must be limited to "applicable nonbankruptcy *state* law." Here the legislative history refers to the need to extend *in forma pauperis* status to aliens but the history neither mentions associations nor indicates in any fashion that "person" must be limited to "natural person." Like the legislative history claims in *Patterson*, the petitioners' arguments must be rejected. The legislative history reveals no affirmative and clear legislative intention to give § 1915(a) a meaning contrary to the plain language of the statute.

Respectfully submitted,

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